CR-2023-000238

Neutral Citation Number: [2023] EWHC 988 (Ch)

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

28 April 2023

Before:

MR JUSTICE LEECH

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IN THE MATTER OF NASMYTH GROUP LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

MR MARCUS HAYWOOD and **MS STEFANIE WILKINS** (instructed by **Pinsent Masons LLP**) appeared on behalf of the Applicant Company
MS CHARLOTTE COOKE (instructed by **His Majesty's Revenue and Customs**) for His Majesty's Revenue and Customs
MR SIMON PASSFIELD (instructed by **Averta Employment Lawyers LLP**) for Mr Peter John Smith
MR CHRISTOPHER JOHN HENSON in person

Hearing dates: 24, 25 and 26 April 2023

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APPROVED JUDGMENT

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This judgment was handed down remotely at 1pm on 28 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Leech:

I. The Application

1. By Claim Form dated 17 January 2023 Nasmyth Group Ltd (the "**Company**") applied for an order for directions for the convening and conduct of meetings of certain of the Company's creditors (the "**Plan Meetings**") for the purposes of considering and if thought fit approving a proposed restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006.

2. On 14 February 2023 the convening hearing took place before me (the "**Convening Hearing**") and I made an order (the "**Convening Order**") giving the Company liberty to convene five meetings of creditors (the "**Plan Meetings**") to consider and, if thought fit, approve the Plan. I also gave a judgment in which I explained the reasons for making the Convening Order and giving the relevant directions (the "**Convening Judgment**"): see [2023] EWHC 696 (Ch).

3. On 3 March 2023 the Plan Meetings took place and the Chair of the Plan Meetings, Mr Mark Fry of Begbies Traynor Group PLC ("**BTG**"), recorded that the Plan had been approved by a majority of all other classes of creditors voting at each Plan Meeting apart from the preferential creditor class of which the sole member was His Majesty's Revenue and Customs ("**HMRC**"). The Plan Company then applied to the Court to sanction the Plan and to order a "cross-class cram down" in relation to HMRC. On 24, 25 and 26 April 2023 I heard the Company's application and Mr Marcus Haywood and Ms Stefanie Wilkins appeared for the Company.

4. Two creditors appeared by counsel at the hearing. Ms Charlotte Cooke appeared on behalf of HMRC and Mr Simon Passfield appeared on behalf of Mr Peter Smith, one of the unsecured creditors. Mr Christopher Henson, another unsecured creditor, appeared in person. Mr Smith challenged the outcome of the Plan Meeting of unsecured creditors on the basis that his claim should not have been valued at £1 by Mr Fry. Mr Henson challenged the outcome of the same Plan Meeting on the basis that he was given inadequate notice of it and unable to vote.

5. Mr Smith, Mr Henson and HMRC all opposed the sanction of the Plan because it was unfair. HMRC also opposed the sanction of the Plan because there was "blot" or "roadblock" preventing the Plan from taking effect, namely, that it was dependant on HMRC entering into "time to pay" ("**TTP**") agreements or arrangements with a number of the Company's subsidiaries and HMRC has now rejected their proposals.

6. Although I found that the threshold Conditions A and B were satisfied on the evidence then before the Court in the Convening Judgment, I made it clear that this was the basis of my findings and that it would be open to any opposing creditors to put in further evidence and challenge those findings at the sanction hearing: see [27]. I also pointed out that the two blots or roadblocks which I had identified might have been resolved by the sanction hearing. But in the event that they were not, it was open to HMRC and Mr Smith to raise those issues again: see [35] and [36].

7. The Company's evidence in support of the sanction of the Plan was given by Mr Nicholas Robins, one of its directors, and he made six witness statements dated 6 February 2023, 10 February 2023, 10 March 2023, 31 March 2023, 19 April 2023 and 25 April 2023. I will refer to them as "**Robins 1**", "**Robins 2**", "**Robins 3**", "**Robins 4**", **"Robins 5**" and "**Robins 6**". No application was made to cross-examine him by counsel for any of the opposing creditors.

8. HMRC filed two witness statements from Mr Luke Malin, an officer in the Enforcement and Insolvency Team, dated 13 February 2023 and 23 March 2023 ("**Malin 1**" and "**Malin 2**") and a witness statement dated 20 April 2023 from Mr Sheamie Donnelly, who is head of Large & Sensitive Debt in HMRC's Debt Management directorate. Mr Smith filed a witness statement dated 24 March 2023 and Mr Henson filed a letter 22 March 2023 and a Skeleton Argument annexing some additional materials. Mr Haywood did not apply to cross-examine any of them.

9. BTG prepared two expert reports on the instructions of the Company dated 3 February 2023 and 10 March 2023 respectively and I will refer to them as the "**First BTG Report**" and the "**Second BTG Report**". The Company relied on

them to demonstrate that the "**No Worse Off Test**" (as I define it below) was satisfied. None of the opposing creditors chose to file or rely on expert evidence to challenge BTG's conclusions directly.

II. Background

10. I set out the essential background in the Convening Judgment at [4] to [16] which I will not repeat here. I also adopt the same defined terms and abbreviations which I used in that judgment. But given the issues which arose at the sanction hearing it is necessary for me to set out some of the background in more detail. I begin with the sale of shares in February 2022 and the associated re-financing of the Company.

(1) The Equity Sale

11. Mr Smith's evidence was that on 15 October 2003 he founded the Company and that he owned 86.4% of the equity, Mr Simon Beech owned 9.5% and Mr Maurice Edmonds owned 4.1%. From March 2018 onwards he encountered serious health problems but his evidence was that this did not prevent him from being an effective Chief Executive Officer ("**CEO**") of the Group if appropriate adjustments were made.

12. In the Convening Judgment I recorded that the Group began to experience financial difficulties during the Pandemic and instructed Kroll to assist it to arrange a debt refinancing or equity sale. Mr Smith's evidence was that this resulted in a dramatic slowdown in international trade with manufacturing hit particularly hard and that the Group encountered cashflow issues as a result of one of its largest customers, INCORA (which I understand to be a procurement arm of Rolls Royce), failing to file accounts on time.

13. Mr Smith's evidence was that there were many bidders interested in the Group and the First BTG Report recorded that Kroll received 10 indicative offers but when it was not possible to refinance the Group, management revisited the equity offers which it had received and invited the top three parties (including RCapital) to participate in a second stage. The report also recorded that all three offers were revised during the bidding process and as a result of further due diligence

RCapital amended their offer to zero cash on completion of the sale but increased the overall consideration to £2m to be satisfied by the issue of loan notes. The authors of the report also made the comment that whilst management did not agree with all of RCapital's commercial concerns, they accepted this compromise. In the First BTG Report, BTG's conclusion was that Kroll had undertaken an "an extensive and thorough marketing process" with the result that "the total equity value of the Group was shown at the time to be £2m at best (on the basis that consideration was paid by way of a conditional loan note)".

14. Mr Smith gave evidence that RCapital required Mr Beech and him to acquire Mr Edmonds' shares shortly before the acquisition because he had recently retired and this left Mr Smith with 90% of the shares in the Company and Mr Beech with 10% of the shares. The Company accepted that Mr Smith and Mr Beech had bought Mr Edmonds' shares but challenged Mr Smith's evidence that RCapital required them to do so. In my judgment, nothing turns on this evidential dispute and I do not have to resolve it.

15. On 21 February 2022 Mr Smith and Mr Beech sold 80% of the shares in the Company to Lettbel, a special purpose vehicle controlled by RCapital, and on completion Lettbel owned 16,000 A shares (or 80%) Mr Smith owned 2,000 C shares (or 10%), Mr Beech owned 1,000 B shares (or 5%) and Mr Stuart Fyfe, who appeared at the Convening Hearing but did not oppose the sanction of the Plan, held another 1,000 B shares (or 5%). Mr Smith remained the CEO of the Company and the Group, Mr Beech remained the Chief Operating Officer ("**COO**") and Mr Fyfe became the Chief Financial Officer ("**CFO**"). On 25 January 2022 Mr Smith had entered into a service agreement terminable on 12 months' written notice under which he received a salary of £260,000.

16. As I have stated, RCapital changed its bid and Mr Smith and Mr Beech did not receive any cash consideration for the sale of their shares but loan notes issued by Lettbel instead. In particular, Lettbel issued notes to Mr Smith with a face value of £1,440,000 and loan notes with a face value of £360,000 to a family trust (the "**Loan Notes**") although they only became payable once the JCP Facility had been repaid in full. Mr Passfield took me to the share purchase agreement and also to Lettbel's Articles of Association which contained an

earnout or "**ratchet**" provision under which Mr Smith's entitlement to shares increased from 10% to 20% if the equity value of the Company reached £30 million and increased to £49 million.

17. Lettbel's articles also contained bad leaver provisions which provided that if Mr Smith committed a "**C Share Transfer Event**" (which included an act of gross misconduct), Rcapital was entitled to acquire his shares for £1 under the terms of Lettbel's shareholders' agreement. Lettbel was also entitled to redeem the Loan Notes for £1 if Mr Smith committed a "**Relevant Bad Leaver Event**".

18. The directors of RCapital were (and remain) Mr Christopher Campbell, Mr Philip Emmerson and Mr Jamie Constable. On 6 March 2023 Mr Ashley Reek was also appointed to be a director. Following completion, the directors of Lettbel were Mr Smith, Mr Fyfe, Mr Beech and Mr Reek and the directors of the Company were Mr Smith, Mr Beech and Mr Fyfe. On 17 October 2022 Mr Robins, Mr Antony Upton (the new CEO) and W1S Ltd ("**W1S**") were appointed to be directors. Mr Campbell, Mr Emmerson and Mr Constable are all directors of W1S.

(2) The New Facilities

19. On 21 February 2022 the Company also entered into the finance arrangements with STB and JCP which I described in the Convening Judgment at [8] and [9]. Mr Haywood confirmed that RCapital brought STB on board as the senior secured lender but that it was (and is) an independent "challenger bank". STB provided facilities under an asset-based lending agreement under which it provided the Group with a receivables finance facility of £15 million and an overpayment facility of £5 million (together "**the STB Facility**") secured by a cross guarantee from the Company. I was told that the STB Facility was intended to last for 30 months and thereafter terminable on 6 months' notice.

20. JCP also granted the Group a new loan facility ("**the JCP Facility**") under what was described as a secured working capital loan agreement. It provided for an initial advance of £5.5 million and a total discretionary commitment of £15.5 million. Again, the JCP Facility was secured by a cross guarantee and a debenture from the Company. Mr Smith's evidence was that he understood or

expected that JCP would make the entire loan facility available to the Group over time even though it had only sanctioned the initial advance of £5.5 million.

21. Mr Passfield also took me to a letter dated 17 January 2023 in which Isadore Goldman, who were acting for Mr Fyfe, pointed out that the Company's original forecasts assumed that the facility of £15.5 million would be utilised but the board then produced a revised forecast at the request of RCapital which assumed that the initial tranche of £5.5 million would be utilised only. They also pointed out that this forecast produced a negative cash position of –£0.4 million in December 2022 and this must have come as no surprise to JCP.

22. Mr Robins disputed this evidence and stated that the balance of the facility had originally been intended to fund growth and acquisitions. Either way, Mr Haywood took me to the provisions of the JCP Facility and I am satisfied that whether or not the management of the Company expected to be able to draw on the entire facility, JCP had an absolute discretion whether to advance the balance of about £8 million.

(3) Mr Smith

23. It was also Mr Smith's evidence that soon after the acquisition he refused RCapital's request that he stand down and take a non-executive role and that shortly after he did so, he was suspended and then subsequently dismissed for gross misconduct. It is his case that on 30 March 2022 Mr Reek asked him to sign a letter agreeing to become a non-executive director and accept a salary of £60,000 and that he rejected this offer and a subsequent offer to pay him £120,000 to leave the business entirely.

24. On 29 April 2022 the Company suspended Mr Smith and after taking disciplinary proceedings, the Company dismissed him on 7 July 2022. Mr Smith's case is that he was dismissed on the grounds that he had deliberately failed to inform two customers, Weston Aerospace and GKN Aerospace, that the wrong materials had been used in the manufacture of their components, that he had conducted himself dishonestly by lying about this when he was confronted about it and that he failed to provide correct information to the board of directors. It was also Mr Smith's case that this was no more than an excuse because the

materials used were, in fact, more expensive and did not affect the final product and that the disciplinary proceedings brought against him were a sham.

25. On 17 October 2022 Mr Smith was removed as a director of the Company and Mr Upton was appointed in his place and on 2 November 2022 Mr Smith was removed as a director Lettbel. On 15 November 2022 Mr Smith issued claims in the Midlands (West) Employment Tribunal for unfair dismissal and discrimination (the "**Employment Claims**") and on 22 November 2022 he also issued proceedings in the High Court for wrongful dismissal and for declarations that a C Transfer Event and a Relevant Bad Leaver Event had not taken place (the "**High Court Claims**"). In this judgment, I will refer to the Employment Claims and the High Court Claims together as the "**Smith Claims**".

26. In the Employment Claims, Mr Smith's case is that the Company, Mr Constable, Mr Reek and Mr Emmerson were guilty of discriminatory conduct and harassment and that he was unfairly dismissed. In the High Court Claims, his case is that he was wrongfully dismissed in breach of contract and that he was a good leaver for the purposes of Lettbel's Articles. On 3 January 2023 the Employment Claims were stayed pending the outcome of the High Court Claims and the parties agreed to adjourn the first CMC in the High Court Claims until after the sanction hearing had taken place.

27. Mr Smith points out that if the Plan is sanctioned, the effect will be to compromise his Employment Claims against the Company and the corresponding High Court Claim for wrongful dismissal. But his Employment Claims against Mr Constable, Mr Emmerson and Mr Reek and his claim for declaratory relief against Lettbel will continue. He also points out that if the Plan is sanctioned, the effect will be to permit the transfer of Lettbel's shares in the Company to W5SD Ltd ("**W5SD**") for £1 (see below) leaving Lettbel as a shell company with no assets against which he will be able to enforce the Loan Notes.

(4) Mr Henson

28. Mr Henson's evidence to me was that he had been a loyal servant of the Company for 38 years and that between 2011 and 2013 he transferred from a Group facility and became employed by the Company as the Vice-President

(Business Development) and reported to Mr Smith as CEO. It was also his evidence that on 6 April 2021 he received an email confirming that he was to receive a salary of US $180,000 and a bonus of $160,000 payable in six monthly instalments commencing in June 2021 and that a new service contract would follow. As I understood his evidence, the bonus was largely intended to compensate him for expenses which he had already incurred and that his salary and bonus were intended to be paid in US dollars to enable him to take advantage of the beneficial exchange rate (although the figure for his bonus should have been £160,000 converted into US dollars rather than US $160,000).

29. It was also Mr Henson's evidence that on 13 June 2022 he was asked to attend a meeting with an HR consultant and an RCapital investor after which he received a letter stating that his job was at risk and that by letter dated 30 June 2022 the Company informed him that he had been made redundant. On 8 December 2022 Mr Henson also commenced proceedings in the Midlands (West) Employment Tribunal claiming unfair dismissal, his redundancy payment and protective award and compensation for age discrimination. The Particulars of Claim allege that there was no genuine redundancy situation because his role is being carried out by other employees and there was no dismissal meeting or right of appeal offered.

30. Mr Henson told me that his claim in the Employment Tribunal did not include the claim for £160,000 in bonus and expenses and that he had been advised that he would need to bring a civil claim to recover it although he had 6 years to do so. I will refer to Mr Henson's employment claim and his claim for £160,000 together as the "**Henson Claims**".

31. Mr Henson's evidence to me was that the timing of his dismissal was intended to enable the Company to treat him as an unsecured creditor and so that it could avoid meeting its liabilities to him as an employee. He contrasts the treatment of Mr Beech (to which I refer below). As I pointed out in argument, Mr Henson was made redundant only one week before Mr Smith's dismissal. Mr Henson also described the personal consequences for him if I sanctioned the Plan and the unsecured creditors were crammed down.

(5) Mr Fyfe

32. Mr Fyfe opposed the Plan at the Convening Hearing. However, on 10 March 2023 he entered into an agreement with Rcapital, Lettbel, JCP and W5SD under which they have agreed to release all claims against him under the Lettbel shareholders' agreement or in relation to his shares in Lettbel. In return, Mr Fyfe will be paid £50,000 as a contribution to his legal costs and he will release the other parties. If the transfer of shares in the Company by Lettbel to W5SD takes place, Mr Fyfe will be granted £50,000 in loan notes by W5SD repayable within 3 years or an earlier disposal, listing or sale of the Company or its shares.

33. Mr Haywood and Ms Wilkins pointed out in their Skeleton Argument that the Company is not a party to this agreement and Mr Fyfe's claim against the Company remains unaffected and will be compromised under the Plan (if sanctioned). Mr Fyfe voted in favour at the Plan Meeting of the unsecured creditors and no longer advances any opposition to the sanction of the Plan.

34. By letter dated 19 April 2023 Pinsent Masons made a similar offer to Mr Smith on behalf of Lettbel, JCP, RCapital and W5SD (on an open basis). In particular, they offered to pay him £50,000 in respect of his time costs and legal fees. They also offered to grant him £100,000 in loan notes on similar terms to Mr Fyfe if he agreed to compromise all of the Smith Claims against them (as opposed to the Company) and took no further steps to oppose the sanction of the Plan. Mr Smith did not accept that offer.

(6) HMRC

35. Mr Malin gave evidence that HMRC is a preferential creditor for £209,703.01 which consisted of liabilities in respect of PAYE, NIC and VAT and some of those liabilities date back to August 2022. The Company also owes £236,154.22 to HMRC in respect of which it ranks as an ordinary unsecured creditor. Some of that debt dates back to January 2021. The total debt owed by the Company to HMRC is therefore £472,308.44 and interest continues to accrue. Mr Malin gave evidence to prove all of these figures: see Malin 1.

36. In addition, members of the Group owe a total of £2,561,499.38 to HMRC and some of those liabilities date back to 31 January 2020: see Malin 1. Mr Malin also gave evidence in Malin 2 that the Company had no entitlement to be granted time to pay those debts which was a concession. Mr Donnelly gave evidence that HMRC expects that any and all entities within a group of companies to provide assistance to ensure that all debt is paid and that TTP should only be requested as a last resort and when all other avenues are exhausted. Moreover, he stated that these avenues should include the involvement of the shareholders or owners and lenders and any request for TTP arrangements should include all of a customer's debt. He confirmed that it is a concession and that taxpayers do not have a right to it.

37. Mr Donnelly also gave evidence that HMRC agreed TTP arrangements for all of the Group's debt (including that of the Company) in February 2022 and that it defaulted in September 2022. He pointed out that the Company was recapitalised by RCapital in February 2022 and that RCapital took significant equity and that this was not disclosed to HMRC at the time of the acquisition. His evidence was that the Group's debt should clearly have been paid in full whereas members of the Group went on to default on the TTP agreement by not paying PAYE due on 22 September 2022 and 22 October 2022 and also VAT due in August 2022. Finally, he gave evidence that the Group requested a further TTP agreement in November 2022 but that this request was rejected.

38. Mr Haywood disputed Mr Donnelly's contention that the Company had failed to disclose the acquisition when it was negotiating new TTP arrangements in February 2022. He stated that the Court bundle contained a number of emails which demonstrated that this information was not withheld although I was not taken to them.

(7) Events of Default

39. On 31 January 2023 Western Union Business Solutions ("**Western Union**") served a statutory demand for £164,849.83 against the Company: see the Convening Judgment at [11]. In Robins 1, Mr Robins confirmed that the Company did not dispute this debt but was unable to pay it. He also confirmed

that this was an Event of Default under the JCP Facility. It was also his evidence that the Smith Claims gave rise to a further Event of Default and that JCP was entitled to demand repayment of approximately £7.5 million. These Events of Default also triggered an Event of Default under the STB Facility.

40. Both secured lenders agreed, however, to standstill agreements subject to the sanction of the Plan. By a letter dated 8 December 2022 JCP informed the Company that the launch of the Plan and the Smith Claims gave rise to Events of Default but that it was prepared to take no action until the sanction and implementation of the Plan. By a letter also dated 8 December 2022 STB agreed to similar terms.

41. Finally, Mr Robins gave evidence that JCP was no longer prepared to extend credit to the Group. Mr Haywood took me to a letter dated 10 March 2023 from JCP to Lettbel recording that JCP's support for the Plan was conditional on the transfer of the shares in the Company by Lettbel to W5SD for £1 and that it was not in a position to provide further funding to the Group given its financial position unless the Court sanctioned the Plan. The letter was signed by Mr Campbell on behalf of JCP and also counter-signed by him on behalf of Lettbel.

42. Mr Haywood submitted that this was a credible position because JCP is an investment fund and the Group no longer met its investment criteria. Put simply, RCapital and JCP were no longer prepared to "throw good money after bad" unless the Plan was sanctioned. Mr Passfield submitted that the fact that Mr Campbell had signed the letter on behalf of both parties showed that it was an item of correspondence which had been produced for the benefit of the Court and third parties and that I should attach little weight to it.

III. The Plan

43. I set out the Plan proposals in the Convening Judgment at [18]. None of the parties suggested that there had been material changes since the date of the Convening Hearing and I summarise the basic proposals again immediately below:

(1) STB, the senior secured lender, will waive existing defaults under the terms of the Plan and be unable to take enforcement action for 3 months following sanction, but the quantum of its debt and its security will not be compromised.

(2) JCP, the junior secured lender, will make available the balance of the JCP Facility of £15.5 million (which amounts to approximately £8 million) on new terms and a new committed tranche of £1 million will be made available. The quantum and security will not be compromised either but the repayment date will be extended until 21 February 2029 and the Company will give new covenants.

(3) The claims of preferential creditors will be compromised in full for £10,000 to be distributed on a *pari passu* basis. HMRC is the only preferential creditor (in respect of part of its debt).

(4) The claims of unsecured creditors will be compromised in full for £10,000 also to be distributed on a *pari passu* basis. The unsecured creditors identified at the sanction hearing were as follows: Mr Smith, Mr Fyfe, Mr Henson, foreign exchange hedging liabilities totally approximately £230,000 and miscellaneous debts totalling approximately £16,000.

(5) The claims of intercompany creditors' claims will be compromised in full for no consideration (to which they have all consented).

(6) The claims of critical supply creditors identified by the Company remain unaffected by the Plan and they will be repaid in full.

44. The Company relied on the two BTG reports to satisfy the relevant conditions for sanctioning the Plan. In both reports BTG expressed the opinion that the relevant alternative was administration and each report contained an Estimated Outcome Statement or comparing the likely returns under the Plan with the returns in an administration. Mr Haywood and Ms Wilkins set out the comparison in a table in their Skeleton Argument which I reproduce below:

Class of Creditor	Restructuring Plan (p/£)	Relevant Alternative (p/£)
Senior Secured Creditor	100	100
Junior Secured Creditor	100	55.3
Preferential Creditors	4.8	NIL
Unsecured Creditors	0.09	NIL
Intercompany Creditors	NIL	NIL
Critical Supply Creditors	100	NIL

(1) Creditors

45. The Company's case is that under the relevant alternative the value will "break" well within the junior secured debt and that all of the other creditors will be "out of the money". The Company submits that STB will be no worse off because it will be repaid in full, JCP will be significantly better off because it will be repaid in full over the lifetime of the JCP Facility, HMRC will be no worse off because it will recover £10,000 at 4.8 pence in the pound and that all of the other creditors will be no worse off either because they will share in a small pool of £10,000.

46. Mr Robins' evidence was that the JCP Facility (as amended) would ensure the survival of the Group as a going concern. He had to accept, however, that this outcome was subject to the Company's subsidiaries agreeing TTP arrangements with HMRC. He did not suggest that the Company was prepared to treat HMRC as a critical supply creditor or to pay off some or all of the Company's debt to HMRC in return for the agreeing to TTP arrangements with the Group or that the Company had ever considered asking the Court to sanction the Plan on that basis.

47. Mr Donnelly's evidence was that on 12 April 2023 HMRC had rejected the Company's TTP proposal as unacceptable because it did not include the Company's debt. This position had not changed at the date of the sanction hearing. He also criticised the Company because most TTP arrangements were resolved in a short period of time unless taxpayers do not submit their best

proposals at first or continually come back with sub-standard proposals. He also pointed out that a TTP arrangement is a mechanism for clearing debt and not a turnaround mechanism.

48. Mr Smith also challenged Mr Robins' evidence that the Plan was necessary to ensure the survival of the Company or the Group. Mr Smith's evidence was that he understood from a contact (whom he did not name) that RCapital had approached Kroll before his dismissal in June 2022 about preparing a restructuring plan for the Company. He drew the inference that RCapital had always intended to put forward a restructuring plan and that the current application was not based on the Company's recent financial position. Mr Robins gave evidence that he was not aware of such an approach to Kroll: see Robins 4. But he did not deny that such an approach had taken place and the Company did not adduce any evidence from Mr Campbell, Mr Emmerson or Mr Constable to deal with this point or any of the other points raised by Mr Smith.

49. Mr Passfield also took me through the evolution of the Plan to show that JCP had not originally offered any new money or a contractual commitment to provide funding for the next five years. He took me first to the minutes of the meeting of the board of directors on 7 December 2022 at which Mr Robins, Mr Upton and Mr Emmerson were present. Those minutes recorded as follows:

> "2.4 It was noted that a number of options have been explored and investigated with a view to finding a solution that is in the best interests of the Company and its creditors. As a result of this investigation, the Directors are proposing the Restructuring Plan which will compromise certain unsecured creditors of the Company and will result in a better overall outcome for creditors.
>
> 2.5 The Chair explained that the former director, Peter Smith, had begun proceedings for wrongful dismissal against the Company in the High Court for up to £8,157,300 and claims for unfair dismissal and discrimination on the basis of age and disability in the Employment Tribunal. The Company disputed the claims but in any event did not have the means to make any payment in respect of the claims."

50. Mr Passfield pointed out that JCP had not served a demand on the Company requiring it to pay all sums due under the JCP Facility. He also pointed out that the Company had filed no evidence to show that JCP intended to call in the

facility at the date of this meeting and that on the day after this meeting both JCP and STB entered into the standstill agreements (above). Mr Passfield took me next to the Practice Statement letter dated 8 December 2022 (the "**PSL**") in which the Company gave the following reasons for entering into a restructuring plan:

> "26. As a consequence of the underperformance of the Group, JCP has had to make available additional drawdowns under its loan facility (not forecast at the time of the Sale) of approximately £2.0 million to the Group.
>
> 27. A former director of the Company was also dismissed for gross misconduct following the Sale and has subsequently instigated a claim for wrongful dismissal against the Company in the High Court and claims for unfair dismissal and discrimination on the basis of age and disability in the Employment Tribunal, all of which are disputed but which have caused further disruption (the "Claims"). Whilst the Company does not believe the Claims have merit, it does not have the financial means to pay the alleged sums claimed, which in the High Court proceedings amount to £8,157,300, nor does it have the means to fund the defence to the Claims.
>
> 28. The recent movements in the USD/Sterling exchange rate have brought a particular urgency to the Company's situation. The foreign exchange movements have triggered margin calls under the Company's forward foreign exchange contract of approximately £300,000 in aggregate which the Company cannot meet.
>
> 29. As a result of all of the foregoing factors, the Company now immediately requires new funding and a restructuring of its debts to enable it to avoid going into administration.
>
> 30. The facilities provided by STB to the Group are in default as a result of the Claims and the proposed Restructuring Plan. STB is now entitled to make a demand of the Company (and other Obligors) for the entirety of the sums owed to STB (in the sum of approximately £13.3 million). The Company would be unable to meet any such demand. However, a standstill agreement has been entered into with STB pending sanction of the Restructuring Plan.
>
> 31. The facilities provided by JCP to the Group are also in default as a result of the Claims and the proposed Restructuring Plan. JCP is now entitled to make a demand of the Company (and other Obligors) for the entirety of the sums owed to JCP (in the sum of approximately £7.5 million). The Company would be unable to meet any such demand. However, a standstill agreement has been entered into with JCP pending sanction of the Restructuring Plan. JCP is not obliged to make any further sums available to the Company."

51. Mr Passfield pointed out that the only Events of Default upon which the Company relied in the PSL were the Smith Claims and the Plan itself. He submitted that this was clear evidence that the Company had resolved to put forward a restructuring plan to avoid meeting or defending the Smith Claims. Mr Passfield also submitted that there was no suggestion at that stage that any amendments were proposed to the JCP Facility. He then took me to the update to the PSL dated 19 January 2023 when the Company proposed to make the following amendments to the JCP Facility for the first time:

> "Paragraph 39 of the PSL explained that, in the event that the Restructuring Plan was sanctioned, JCP would make available the Post Sanction Funding – i.e. the balance of its £15.5 million facility on its existing terms (which is approximately £8 million). The terms of the Post Sanction Funding have now changed. Specifically: a. The repayment date in respect of all sums owed to JCP will be extended by 5 years to 21 February 2027. b. Out of the balance of the £8 million, a new fully committed tranche of £1 million will be made available to the Group; and c. The facility will be amended to include new covenants appropriate for the restructured Group.
>
> 12. These terms will be of significant benefit to the Company and the Group as a whole (in particular the fact that no repayment to JCP will be required to 21 February 2027 and the new fully committed tranche of £1 million which will be made available to the Group on sanction of the Restructuring Plan). The amendments proposed to the facility agreement with JCP will be included in the Restructuring Plan (which as described below will be uploaded to the Plan Website shortly)."

52. In opening, I had asked Mr Haywood to take me to those amendments to confirm that the Plan (if sanctioned) would require JCP to make a contractual commitment to support the Group until 2029. Mr Haywood took me through them carefully and satisfied me that if the Plan were to be sanctioned, then JCP would be contractually bound to advance the balance of the JCP Facility to the Company and to extend time for repayment until 21 February 2029. Mr Haywood also submitted that for the purposes of considering whether to sanction the Plan, I should treat JCP as a provider of "new money" to the Group.

53. In his oral submissions, however, Mr Passfield pointed out that under the Plan the JCP Facility would also be amended to include a new clause 12.2.1. This required the Company and its subsidiaries to covenant on a quarterly basis that

the Group would achieve a certain level of EBITDA. It also provided that JCP could adjust the figure at its absolute discretion. The EBITDA figure which the Group would have to achieve by the last day of May 2023 is £1,300,404.

54. Mr Passfield also took me to the financial information which Mr Robins had exhibited to Robins 5 on 19 April 2023. This showed that the Group was forecast to achieve an EBITDA of £463,500 for the entire year from 1 May 2022 to 30 April 2023. The EBITDA figure for March 2023 was £30,700 but no figure was given for April 2023. Mr Passfield submitted that it was impossible to see how the Group could achieve a total EBITDA of £1,300,404 in the light of these figures and that the Company would be in breach of covenant almost as soon as the Plan was sanctioned. He also submitted that there was no guarantee, therefore, that JCP would provide the additional funding of £8 million until 2029.

55. Mr Haywood accepted that it was improbable that the Group would achieve an EBITDA of £1,300,404 for the three month period ending on 31 May 2023. But he stated on instructions that JCP would be prepared to waive that breach of covenant. The Company did not adduce any evidence from JCP to confirm that it would waive such a breach of covenant although Mr Haywood stated that the Company would be prepared to give or procure an undertaking to that effect.

(2) Members

56. The Plan will not affect the rights of members (Lettbel, Mr Smith and Mr Beech). However, as I have indicated, JCP has only agreed to the Plan on condition that Lettbel will transfer its shares in the Company to W5SD (which is also associated with RCapital) for £1. The share purchase agreement is conditional upon the Plan being sanctioned and JCP also has security over the shares in the Company. Mr Haywood submitted that in the event that the proposed share transfer does not take effect by agreement, JCP will have the right to enforce its security and to appoint fixed charge receivers over the Company's shares.

57. Given Mr Smith's understandable concern that the transfer of shares to W5SD will leave Lettbel as a shell and that both he and his family trust will be unable to enforce their loan notes even if he is successful in either the High Court Claims

or the Employment Claims, I asked Mr Haywood to explain its rationale. He explained that the purpose of the share transfer was to achieve a clean break between the majority shareholder and the minority shareholders who will have no future involvement in the Group.

58. I also asked Mr Haywood to explain how the receivers would be able to sell the shares for £1 in the event that I refused to sanction the Plan. He submitted that the shares had no value because the Company was insolvent. He also reminded me that at the Convening Hearing, he had identified the possibility that Mr Smith might apply for an injunction to restrain the sale on the basis that the directors of Lettbel would be acting in breach of fiduciary duty but no such application had been made or threatened. Finally, he submitted that JCP as a provider of new money was entitled to the restructuring surplus (including the value of any equity).

(3) Critical Supply Creditors

59. The original Explanatory Statement put before the Court at the Convening Hearing identified critical supply creditors totalling £1,034,578.96 as at 22 December 2022. These creditors were divided into the following classes: operational, facilities, IT infrastructure, employee liability, professional advice, insurance and "Miscellaneous Accruals". Ms Cooke objected that it was impossible to tell from this list whether these creditors were truly critical and I directed that the Company should address this issue in a revised Explanatory Statement. She objected, in particular, to the category of Miscellaneous Accruals.

60. In response, the Company prepared an updated table of critical supply creditors as at 29 January 2023 together with a description of the creditors, whether they were connected parties, the amounts due as at 22 December 2022 and 23 January 2023 and an explanation for any change of position. The list was reduced dramatically to £431,223.68. The Company removed from the list the entire category of "Miscellaneous Accruals" of £157,466.31 on the basis that they were "merely provisions for possible future liabilities". They also removed a management fee of £30,000 payable to RCapital and reduced a fee of

£100,714.73 to £1,507.50 payable to RJP LLP (another connected entity) for what was said to be providing essential services "in relation to corporation tax compliance".

61. Mr Smith continued to object to a number of creditors being treated as critical and being paid in full. He identified five creditors and gave his reasons for challenging them. Mr Robins addressed them in Robins 4 and I set out Mr Smith's objections and Mr Robins' answers immediately below:

    (1) *ADS Group Ltd* (£17,538.60): This a trade association and membership is not critical: see Smith, ¶42.1. The Company's response is that this is the leading trade body, the Company holds positions on sub-boards and it enables the Company to shape policy and approach for the industry: see Robins 4, ¶41.1.1.

    (2) *ADS Toulouse SARL* (£6,448.44): This is a voluntary contribution to running the ADS trade association and most members do not contribute to the running costs: see Smith, ¶42.2. The Company's response is that ADS Toulouse is located at Airbus in Toulouse and gives the Company a physical presence at the location of its key customer: see Robins 4, ¶41.1.2.

    (3) *Farnborough International Ltd* (£4,066.00): This relates to an invoice for £4,066 relating to the 2024 air show and does not need to paid in 2023: see Smith, ¶42.3. The Company's response is that this debt does not relate to a future air show but to the reimbursement of critical employees for their attendance at the 2022 air show: Robins 4, ¶41.1.3.

    (4) *Mr Beech* (£100,000): Mr Beech was replaced as COO in November 2022 by Mr Anthony Upton and the Company agreed to pay him a settlement package of £100,000. He was not considered to have a critical role when he was replaced and like Mr Fyfe (who also had a settlement agreement) he should be treated as an unsecured creditor: see Smith 1, ¶42.4. The Company's response is that Mr Beech is critically important to the running of the business as a non-executive director, adviser and ambassador for the Group: see Robins 4, ¶41.1.4.

(5) *SF Recruitment* (£12,960.00): This is a one-off payment to a recruitment agency. The fact that the Company might want to use it again in the future does not make it a critical supply creditor: see Smith 1, ¶42.5. The Company's response is that this is a specialist recruitment business which has provided four staff over the past year, three of whom continue to work for the finance team: see Robins 4, ¶41.1.5.

62. Mr Passfield accepted Mr Robins' evidence in relation to the debt due to Farnborough International Ltd. But he submitted that the explanations which Mr Robins had given for treating the other four creditors as critical supply creditors was inadequate. He pointed out that Mr Beech had agreed to become an ambassador for the Group immediately after the Convening Hearing. He also pointed out that Mr Robins had provided no information about future payments to be made to Mr Beech. Mr Henson told me that Mr Beech was no different from Mr Smith and himself and there was no reason to choose him as an ambassador for the business because he had not been customer-facing, but in operations since 1999.

IV. The Plan Meetings

63. In the Convening Order I gave permission to convene the Plan Meetings and directed that they be held virtually on 3 March 2023 and at the times shown in Appendix 4 of the Explanatory Statement. Appendix 4 provided that the Plan Meeting of the unsecured creditors should be held at 2 pm. It also provided that attendance or proxy forms should be completed and submitted by email by 12 noon on 2 March 2023.

64. On 3 March 2023 the Plan Meetings took place virtually. There is no dispute about what took place at those meetings and I identify the classes and summarise the voting outcome of them as follows:

(1) *Senior Secured Creditor*: STB attended the Plan Meeting by proxy and voted in favour of the Plan.

(2) *Junior Secured Creditor*: JCP attended the Plan Meeting by proxy and voted in favour of the Plan.

(3) *Preferential Creditors*: HMRC, as the sole preferential creditor, attended the Plan Meeting and voted against the Plan.

(4) *Unsecured Creditors*: Three unsecured creditors attended the Plan Meeting by proxy. Mr Fyfe whose claim was admitted by Mr Fry for £860,000 voted in favour of the Plan, HMRC whose claim was admitted by Mr Fry for £253,488.58 voted against the Plan and Mr Smith whose claim was admitted for £1 voted against the Plan. By virtue of Mr Fyfe's vote alone a majority of 77% voted in favour of the Plan. Mr Henson did not vote at the Plan Meeting.

(5) *Intercompany Creditors*: Four intercompany creditors attended the Plan Meeting by proxy and voted in favour of the Plan.

65. Mr Passfield pointed out that for dividend purposes the Company had valued the Smith Claims in full but only for £1 for the purpose of voting at the Plan Meeting of unsecured creditors. Mr Henson accepted that he had received the Plan documents from the solicitors acting for him in the Employment Tribunal, that he had been in the US when he received the documents and that he had tried to vote but that he had been unable to upload his notice of claim and proxy form which were both dated 22 March 2022.

V. Jurisdiction

66. The Court has jurisdiction to make an order under section 901F of the Companies Act 2006 only where the threshold conditions in section 901A are met. I set out those conditions in the Convening Judgment at [23] and I held that they were satisfied on the basis of the evidence before me at the Convening Hearing. But I gave permission for any of the parties to address this issue at the sanction hearing. Ms Cooke and Mr Passfield did not challenge those conclusions at the sanction hearing although Mr Passfield submitted that they were only satisfied because JCP had engineered the Company's financial difficulties by withdrawing funding in order to obtain the "restructuring surplus" for itself and RCapital.

67. I remain satisfied that both conditions were met at the date of the sanction hearing. Whatever the motives or object of the directors of JCP and RCapital, JCP was not contractually committed to make further funds available and neither Ms Cooke nor Mr Passfield challenged the conclusions in both the First BTG Report and the Second BTG Report that the Group has already encountered financial difficulties that have affected its ability to trade and will continue to encounter such difficulties unless JCP provides further funding.

VI. Class Composition

68. I also gave permission for the parties to address the issue of class composition at the sanction hearing. In the event, Mr Fyfe, who was the only creditor who had put forward grounds for challenging the composition of the five classes of creditors, voted in favour of the Plan. None of the other creditors, who opposed the Plan, either at the Convening Hearing or at the present hearing challenged the composition of the classes (although both HMRC and Mr Smith both challenged the classification of individual creditors as critical supply creditors). Again, I am satisfied that the classes were properly identified at the Convening Hearing and that there is no basis for challenging the Plan Meetings on grounds of class composition.

VII. Sanction

69. Section 901F(1) provides that the Court may sanction the Plan if 75% by value of the individual classes of creditors have voted in favour of it subject to the application of section 901(g):

> "(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement. (2) Subsection (1) is subject to— (a) section 901G (sanction for compromise or arrangement where one or more classes dissent),…"

70. Section 901G is headed "sanction for compromise or arrangement where one or more classes dissent". The section provides as follows:

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

71. Section 901G empowers the Court, therefore, to sanction a plan under section 901F notwithstanding that the arrangement has not been approved by the requisite majority in every meeting of creditors provided that conditions A and B are met for each dissenting class. In the present case, it is common ground that there was at least one dissenting class, namely, the preferential creditors. But even if there were two dissenting classes, namely, the preferential creditors and the unsecured creditors, the Court would still have power to sanction the Plan.

(1) Condition A: The No Worse Off Test

72. Condition A prescribes a "**No Worse Off Test**" or "**NWO Test**" and it has been the subject of judicial consideration in a number of cases at first instance. In *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) Snowden J (as he then was) set out the following test at [106] to [108] on which all counsel relied:

> "[106] The "no worse off" test can be approached, first, by identifying what would be most likely to occur in relation to the Plan Companies if the Plans were not sanctioned; second, determining what would be the outcome or consequences of that for the members

> of the dissenting classes (primarily, but not exclusively in terms of their anticipated returns on their claims); and third, comparing that outcome and those consequences with the outcome and consequences for the members of the dissenting classes if the Plans are sanctioned.
>
> [107] It is important to appreciate that under the first stage of this approach, the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than not that a particular alternative outcome would occur. The critical words in the section are what is "most likely" to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two.
>
> [107] Having identified the relevant alternative scenario, the Court is also required to identify its consequences for the members of the dissenting classes. This exercise is inherently uncertain because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain."

73. All three counsel also cited *Re Hurricane Energy plc* [2021] BCC 989 where Zacaroli J adopted the same test. After setting out the three stage test, he provided the following additional guidance:

> "37. As to the first step, the court is not required to be satisfied that a particular alternative would definitely occur, merely (where there are possible alternatives) which one is most likely to occur: Virgin Active at [107].
>
> 38. As to the second step, the outcome or consequences for the shareholders is to be assessed primarily, but not exclusively, in terms of the anticipated returns on their claims: *Virgin Active*, at [106]. In *Re Deep Ocean 1 UK Ltd* [2021] EWHC 38 (Ch), Trower J said of the phrase "any worse off" that it is "…a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay." I consider a similarly broad approach is required in determining whether shareholders are "any worse off" as a result of the Plan: it is necessary to take into account all incidents of their rights as shareholders.
>
> 39. As Snowden J pointed out in *Virgin Active* the exercise at the second stage is inherently uncertain, "because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain". *Virgin Active* was a case where the relevant alternative involved an immediate insolvency process. In such a case (which is more typical in restructurings generally)

> disputes between stakeholders will often focus on the appropriate value to ascribe to assets and liabilities in that insolvency process. That is not the case here where (as I will develop below) the relevant alternative is the continuation of trading for at least a further year.
>
> 40. Where the threshold conditions are satisfied, although the starting point is the approach to the exercise of discretion adopted in relation to schemes under Part 26, the fact that the case involves the application of the cross-class cram-down power in section 901G requires important modifications to that approach: see *Deep Ocean* (above), per Trower J at [44] to [46]. In particular, the reluctance of a court to depart from the outcome of a properly convened meeting of a class of creditors cannot have the same place in the court's approach to sanctioning a restructuring plan to which section 901G applies."

74. Mr Haywood and Ms Cooke were also agreed that the No Worse Off Test had to be assessed primarily in terms of the anticipated return on a creditor's claims although it was necessary to take into account the impact of the restructuring plan on all incidents of liability to the creditors. In *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) Trower J stated this at [35] and [36]:

> "35. Doubtless, the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt. However, the phrase used is "any worse off", which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay.
>
> 36. In the present case, the position on this aspect of the matter is relatively straightforward. A comparison of the return which all of the DSC Other Plan Creditors would make in the CL&T Group Insolvency Scenario with the return that they are likely to receive if the Restructuring Plan is sanctioned establishes not just that no member of the dissenting class would be any worse off, but also that each of them would clearly be better off."

75. Mr Haywood also relied on *Re AGPS BondCo PLC* [2023] EWHC 916 (Ch) where I cited (at [63]) another decision of Trower J in *Re ED&F Man Holdings Ltd* [2022] EWHC 687 (Ch) for the proposition that directors are normally in the best position to identify what will happen if a scheme or plan fails. I accepted that this also applied to the likely outcome under the proposed restructuring plan.

76. Finally, it was common ground that the Company had to prove on a balance of probabilities that Condition A was satisfied. The Court has, therefore, to identify the most likely outcome and, having identified it, to be satisfied on a balance of probabilities that if it eventuates, the dissenting creditors will be no worse off. Mr Haywood also relied on *Re Smile Telecom Holdings Ltd* [2022] Bus LR 591 where Snowden LJ stated at [59] that if creditors wished to challenge the Company's valuation evidence about a particular outcome, it was incumbent upon them to file expert evidence of their own.

77. Mr Passfield did not challenge either of the BTG reports directly. But he submitted that if the Court did not sanction the Plan, then the most likely outcome was that JCP would continue to fund the Company and it would not go into insolvent administration. He invited me to draw that inference or reach that conclusion for the following reasons:

    (1) When RCapital acquired control of the Company, JCP (a connected party) agreed to provide a facility of up to £15.5 million on a discretionary basis. It had funds available and it would have come as no surprise that the Company required that additional funding.

    (2) The PSL stated that the Company had underperformed. But despite the Company's disappointing performance, JCP had been prepared to make additional drawdowns totalling £2 million to the Group. There was no obvious reason why it would not continue to do so if the Plan was not sanctioned.

    (3) In a public LinkedIn video at Christmas 2022 Mr Campbell stated that "Nasmyth is a particularly rewarding transaction …and we go into 2023 with a particularly positive outlook". Mr Robins' explanation was that Mr Campbell had not had "significant meaningful involvement in the operation of the Company" and he had no detailed knowledge about its true financial circumstances. This was not credible given that Mr Campbell signed the letter dated 10 March 2023 on behalf of both JCP and Lettbel.

    (4) On 19 April 2023 Mr Robins exhibited the Group's updated cashflow forecast for the period to 18 June 2023 on the assumption that the Plan was

implemented. This showed a cash requirement of £1.5 million in excess of the facility to which JCP had already committed under the Plan. It is clear, therefore, that JCP is already prepared to lend £1.5 million more than was immediately anticipated under the Plan itself.

(5) JCP's assertion in the letter dated 10 March 2023 that it will not support the Group if the Plan is not sanctioned, is self-serving and self-interested. If it were in JCP's interests to continue funding the Group, it would obviously do so.

(6) When the new management appointed by RCapital dismissed Mr Smith and removed him as a director, it was already considering a restructuring plan and had approached Kroll. The Group's current trading and the Company's current financial position are not the true motivation for the Plan.

(7) The Company has not called any evidence at all to show that JCP intends to put the Company into administration if the Plan is sanctioned. The Court cannot be satisfied on a balance of probabilities that JCP would put the Company into insolvent administration rather than continue to fund it.

78. There was considerable force in these submissions. Moreover, Mr Haywood did not draw my attention to any evidence that it would be necessary to put any of the underlying subsidiaries into immediate administration if the Court did not sanction the Plan. Indeed, Mr Henson told me that the Group is a critical supplier for Rolls Royce and that Rolls Royce would never permit the trading subsidiaries of the Group to go into liquidation or administration.

79. Mr Haywood placed great emphasis on two external factors. First, he relied on the fact that the Company is unable to file accounts on a going concern basis. Secondly, he relied on the fact that Western Union had served a statutory demand on 31 January 2023. But these two factors alone do not explain why the Company will go into immediate administration if the Court does not sanction the Plan. The Company is unable to file its account on a going concern basis because JCP is unwilling to give it the necessary support and Western Union has taken no action despite serving a statutory demand almost three months ago. I

was told at the Convening Hearing that it had undertaken not to serve a winding up petition except on 7 days' notice and no notice had been given by the date of the sanction hearing.

80. I might well have accepted Mr Passfield's submissions, therefore, but for one development (as Mr Haywood described it). At the end of the court day on 25 April 2023 Ms Cooke and Mr Passfield had completed their submissions and Mr Haywood had begun his submissions in reply. I agreed to adjourn the hearing overnight to enable Mr Haywood to complete his reply. However, on the morning of 26 April 2023 the Company provided me with a copy of Robins 6, in which Mr Robins gave evidence that at 9 pm on the previous evening a meeting of the board of directors had taken place in which the board had resolved to put the Company into administration if I did not sanction the Plan. Mr Robins' evidence was as follows:

> "At the meeting, following consideration of a number of factors, including that JCP have reconfirmed that it if the Restructuring Plan is not sanctioned by the Court on Friday 28 April 2023 (when I understand judgment is expected to given) then it will not provide new funding to the Company and having considered of the immediate cash-flow requirements of the Company, it was resolved by the board of directors of the Company that, if the Restructuring Plan is not sanctioned by the Court on Friday 28 April 2023 then the directors would take immediate steps to place the Company into administration."

81. Mr Robins exhibited a copy of the minutes of the meeting. They recorded that the sanction hearing was taking place before me and that my decision was expected on Friday 28 April 2023 (as I had indicated). They then continued:

> "4.2 The Chair informed the meeting that, if the Restructuring Plan is not sanctioned by the Court, on Friday 28 April, then the Company's annual accounts cannot be signed on a going concern basis by the latest filing date of 30 April 2023. This will be a further breach of the Company's banking facilities with Secure Trust Bank Plc ("STB") and JCP Five Limited ("JCP"). In addition, the failure to file accounts when due will place considerable pressure on the Company and the wider group from suppliers who will become aware of the Company's failure to file accounts. There is no moratorium in place to protect the Company against creditor enforcement action including the presentation of a winding up petition.

> 4.3 JCP have reaffirmed their position ahead of this board meeting that they will not provide new funding to the Company if the Restructuring Plan is not sanctioned. It was previously the position of the board that if the Restructuring Plan was not sanctioned by the Court there would be a period of assessment by Insolvency Professionals of the available options to include if appropriate a pre-packaged administration sale of the Company's shareholdings in various subsidiaries. However, the cash requirement of the group is now so significant and pressing that the board now have no alternative but to hereby RESOLVE to take immediate steps if the Restructuring Plan is not sanctioned on Friday 28 April 2023 to place the Company into administration.
>
> The Chair noted that STB being the senior secured creditor of the Company and the holder of a debenture dated 21 February 2022, and JCP, being the junior secured lender of the Company and holder of a debenture also dated 21 February 2022, both of which contain qualifying floating charges over the Company's assets and undertaking, are entitled to receive at least five days' notice of any administration appointment pursuant to Paragraph 26(1) Schedule B1 of the Insolvency Act 1986 and that the Directors would first need to serve a notice of intention to appoint administrators ("Notice of Intention") on STB and JCP.
>
> 4.5 It was RESOLVED that such a Notice of Intention would be immediately filed at Court and served on STB and JCP if the Restructuring Plan is not sanctioned by the Court on Friday 28 April 2023."

82. Mr Passfield (with whom Ms Cooke agreed) submitted that the decision of the board was cynical and transparent and intended to hold a gun to the head of the Court. He also submitted that I should ignore it in deciding whether Condition A was satisfied. He pointed out that neither Robins 6 nor the minutes themselves identified any real change in the Company's position to justify taking this decision even before the Court had decided whether to sanction the Scheme. Moreover, Mr Robins had not exhibited any correspondence from JCP to show when or how it had re-affirmed its position. Nor did he explain how the cash position had deteriorated so badly since the hearing had begun to justify an immediate resolution to file a Notice of Intention.

83. This was also my immediate reaction to being presented with Robins 6 and the minutes of the meeting. The directors of the Company appeared to me to be jumping the gun (to use the same metaphor). Their decision to put the Company into administration even before I had made a decision also gave colour to Mr

Passfield's submission that RCapital, JCP and the directors had engineered the financial difficulties of the Company to cram down HMRC, Mr Smith and Mr Henson. However, Mr Haywood submitted that the minutes represented the genuinely held views of the directors and that they could see no other alternative if the Court did not sanction the Plan.

84. I accept Mr Haywood's submission and despite the cumulative strength of the points which Mr Passfield made, I am unable to accept his submission that the Company has failed to prove the relevant alternative on a balance of probabilities. The board of directors of the Company has made a decision that it will file a Notice of Intention if the Plan is not sanctioned and in the absence of any application to cross-examine Mr Robins (even at this late stage), I must accept his evidence and that the Company has proved to the civil standard that the relevant alternative is an insolvent administration.

85. I also accept that both preferential creditors and the unsecured creditors will be no worse off under the Plan than they would have been if the Company had gone into insolvent administration. None of the opposing creditors filed expert evidence challenging either of the BTG reports or their Estimated Outcome Statements for the relevant alternative or under the Plan itself.

86. Although I am prepared to accept that the directors have taken a decision to file a Notice of Intention and that they believe that they are acting in the best interests of the Company, I continue to have in mind Mr Passfield's seventh point when I come to the exercise of the Court's discretion. The Company called no evidence from JCP or RCapital and although JCP may have re-affirmed its position that it is not prepared to advance further funds unless the Plan is sanctioned, JCP has not made a demand for repayment and, as Mr Passfield pointed out, once the Notice of Intention is filed, it will have five days before any appointment can be made or take effect.

(2) Condition B

87. The Company must also show that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors who would receive a payment or have a genuine economic interest in the event of the

relevant alternative: see section 901G(5). It is common ground that the two classes of secured creditors voted in favour of the Plan, that the class of preferential creditors voted against the Plan and that the intercompany creditors all voted in favour of the Plan.

88. There was an issue between whether the class of unsecured creditors had voted in favour of the Plan by the requisite majority because Mr Fry accepted that Mr Smith was an unsecured creditor but valued his claim at £1 and also because Mr Henson was not permitted to vote at all. Moreover, both HMRC and Mr Smith challenged the classification of critical supply creditors and, in particular, the inclusion of Mr Beech. If, therefore, he and others should have been classified as unsecured creditors, then it might have been necessary either to obtain their consent to the Plan (or, possibly, to hold the Plan Meetings again).

89. Mr Haywood submitted that the Court should not interfere with Mr Fry's decision unless it was made in bad faith, contrary to the Court's direction or on the basis of a mistaken understanding of the law: se *Re Dee Valley Group plc* [2018] Ch 55 at [50] and [51] (Sir Geoffrey Vos C). He also submitted that there were no grounds for interfering with his decision because Mr Fry valued the Smith Claims by analogy with a proposed CVA under Rule 15.31(2) and (3) of the Insolvency (England and Wales) Rules 2016 which provide as follows:

> "(2) A creditor may vote in respect of a debt of an unliquidated or unascertained amount if the convener or chair decides to put upon it an estimated minimum value for the purpose of entitlement to vote and admits the claim for that purpose.
>
> (3) But in relation to a decision procedure in respect of a moratorium under Part A1 of the Act, a proposed CVA or IVA, a debt of an unliquidated or unascertained amount is to be valued at £1 for the purposes of voting unless the convener or chair or an appointed person decides to put a higher value on it."

90. Mr Passfield submitted that it was not appropriate to value the Smith Claims in this way (or, indeed, the Henson Claim). He reminded me that the Company had admitted his claims in full for dividend purposes and he relied on the decision of His Honour Judge Davis-White QC at the convening hearing in *Re Good Box Labs Ltd* [2023] EWHC 274 (Ch). In answer, Mr Haywood drew attention to the

convening order which the judge had made in that case. He also relied on the general reservation in paragraph 8.3 of the Plan.

91. It is unnecessary for me to decide this issue and I consider that in this case it is better for me to express no view. The principal reason why it is unnecessary for me to decide this issue is that Condition A and Condition B are met in relation to the unsecured creditors whether or not they voted in favour or against the Plan. Both STB and JCP voted in favour of the Plan and that is sufficient to give the Court power to cram down both the preferential creditors and the unsecured creditors even if they are both dissenting classes.

92. Moreover, I am also satisfied that the outcome of this issue would not have had a material effect on the exercise of the Court's discretion (below). The class of unsecured creditors was a small one and Mr Fyfe was the only unsecured creditor to vote in favour of the Plan. Moreover, he had very recently entered into an agreement with the Company under which he agreed to vote in favour of the Plan. By contrast, both HMRC and Mr Smith voted against it and Western Union and the remaining creditors (whom Mr Fry valued at approximately £16,000) did not participate in the Plan Meeting at all. I would, therefore, have given only limited weight to Mr Fyfe's vote in favour of the Plan.

93. Mr Henson was very concerned that his vote should be counted (whatever value I attributed to it). For the reasons which I have given it is not necessary for me to decide whether the Plan Meeting was properly conducted or whether his vote should have been counted. But whether or not it should, I have carefully considered the points which he made at the sanction hearing and I am satisfied that he had a full opportunity to be heard and to express his views in opposition to the Plan.

(3) Discretion

94. In their Skeleton Argument Mr Haywood and Ms Wilkins accepted that section 901G does not provide an express test or identify the factors which are relevant to the exercise of discretion. Nevertheless, they set out the following six propositions which provide guidance to the Court:

> "1) The plan company will have a "fair wind" behind it if Conditions A and B are satisfied: see *Re DeepOcean* at [48] per Trower J; *Amicus Finance Plc (In Administration)* [2021] EWHC 3036 (Ch) at [78] per Sir Alistair Norris. Satisfaction of Conditions A and B have been described as a "sound starting point for the exercise of the discretion": see *Re E D & F Man Holdings Limited* [2022] EWHC 687 (Ch) at [39] per Trower J.
>
> 2) It is not the case that a plan will be sanctioned unless the Court thinks it is not "just and equitable" and these words should not be read into section 901G or treated as a statutory test: see *Re Virgin Active* at [219]-[221] per Snowden J.
>
> 3) The correct approach to the exercise of discretion under section 901G is to identify specific factors that are relevant to the exercise of that discretion. Such factors will often be drawn from existing authorities relating to Part 26 schemes and CVAs with appropriate modifications: see Re *DeepOcean* at [44] and [62] per Trower J and *Re Virgin Active* at [222] and [225] per Snowden J; see also paragraph 16 of the Explanatory Notes ("*while there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate*").
>
> 4) Specific factors include whether the affirmative votes in the assenting class are representative of the class, the overall level of support for the plan and whether the plan provides a fair distribution of the benefits of the restructuring: see *Re DeepOcean* at [53]-[65] per Trower J and *Re Virgin Active* at [256]-[300] per Snowden J.
>
> 5) Where no creditor appears to oppose the sanction of the restructuring plan and/or seeks to explain in evidence why it might be said that the plan should not be sanctioned, that will be a relevant factor for the Court to take into account in the exercise of its discretion: *Re E D & F Man Holdings Limited* [2022] EWHC 687 (Ch) at [39] per Trower J; *Re Houst* [2022] B.C.C. 1143 at [42] per Zacaroli J.
>
> 6) The Court will also consider whether there is any blot or defect in the plan which may hinder its operational effectiveness: see *Re DeepOcean* at [66] and *Re Virgin Active* at [313]."

95. In *AGPS BondCo* I accepted that there is no presumption in favour of sanction because Conditions A and B are satisfied. I also accepted that in later authorities, the Court has rowed back from the position that the satisfaction of both conditions gives the plan company "a fair wind": see [65]. Subject to this qualification I accept the general propositions above.

96. I begin with some general observations which apply to all three opposing creditors: HMRC, Mr Smith and Mr Henson. I then go onto consider their individual positions in greater detail. I begin with the weight which I should attach to their opposition generally. I deal with the question of "blot" or "roadblock" separately.

(i) "Out of the money" Creditors

97. Mr Haywood submitted that the Court's approach to creditors with no genuine economic interest in the Company under Part 26A will be the same as its approach to creditors who are out of the money in a Part 26 scheme. In relation to schemes, he relied on *Re Bluebrook Ltd* [2010] BCC 2009 where Mann J summarised the position as follows:

> "…in promoting and entering into a scheme, it is not necessary for the company to consult any class of creditors (or contributories) who are not affected, either because their rights are untouched or because they have no economic interest in the company…If there is a dispute about this, then the court is entitled to ascertain whether a purported class actually has an economic interest in a real, as opposed to a theoretical or merely fanciful sense, and act accordingly…Where things have to be proved, the normal civil standard applies. [MyTravel] indicates that the mere fact that the possibility of establishing a negotiating position and extracting a benefit from a deal is not the same as having a real economic interest."

98. He also relied on the sanction judgment in *Virgin Active* where Snowden J accepted that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which the use of such assets might generate following the restructuring: see [242]. He also stated this (at [249]):

> "The express equation of creditors with "no genuine economic interest in the company" with an "out of the money class" is striking. The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that

> the plan was "unfair" or "not just and equitable" to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in *DeepOcean*."

99. Mr Haywood even went so far as to suggest that it was unnecessary to hold a class meeting of the unsecured creditors because they were all out of the money. Mr Passfield submitted that *Bluebrook* and *Virgin Active* are distinguishable because this involves the distribution of the restructuring surplus to RCapital in circumstances where it has deliberately engineered a situation in which the unsecured creditors have been put out of the money.

100. I accept that it is not usually unfair to cram down unsecured creditors who would be out of the money if the Company went into insolvent administration. I also accept that it is not unusual for out of the money creditors to protest at precisely this outcome. However, I do not accept that Snowden J intended to lay down a rigid rule and there may be circumstances in which the out of the money creditors have a legitimate interest in opposing the Plan.

101. But in any event, in *DeepOcean* Trower J stated that the Court must take into account all of the legal consequences which the restructuring plan will have on the relevant class of creditors in deciding whether they will be worse off if it is implemented: see [35]. Moreover, it is clear from the following paragraph that he was considering the group-wide consequences. Applying this test, I am satisfied that HMRC retains a genuine economic interest in the Company if it goes into administration and I have reached this conclusion for two reasons.

102. First, there is no dispute that the Group owes HMRC £2,961,674.42 (plus further interest) in total and that the Company's subsidiaries will still owe HMRC £2,561,499.38 once the Company has gone into administration. It will remain one of the largest creditors of the Group. Secondly, there is no dispute either that the success of the Plan depends upon HMRC agreeing TTP arrangements with the Group's subsidiaries if it is sanctioned. The Company's position is that HMRC will have no option but to agree TTP arrangements if the Court sanctions the Plan. But HMRC may well take the view that it prefers to negotiate with administrators who are attempting to sell the Group as a going concern and that,

if it does, it has a greater likelihood of agreeing satisfactory TTP arrangements and ultimately to be paid in full.

103. Ms Cooke also submitted that it was artificial to treat JCP as the provider of new money and HMRC as out of the money. It could not be said that HMRC had not contributed to the restructuring surplus by giving the Group time to pay. I also accept that submission. The Plan is predicated on the assumption that JCP will advance the balance of the JCP Facility and that HMRC will enter into new TTP arrangements. Both are significant financial benefits and, in my judgment, both contribute to the restructuring surplus.

104. I add that Ms Cooke relied on the fact that in an administration, the administrators might be able to bring antecedent claims against the directors for wrongful trading or breach of fiduciary duty and they might also choose to investigate the fitness of the directors' conduct. Whilst I accept that this is a possibility, I have not attributed any weight to this factor in reaching the conclusion that HMRC retains a genuine economic interest in the Company. Mr Haywood challenged Ms Cooke to identify any misconduct and she did not put forward any evidence to support such claims. I accept that a claim under Part 26A may often be issued and decided very quickly, but in my judgment, there must be some evidence of misconduct before the Court can attribute any weight to this factor.

105. The position of Mr Smith is more complex. I am not satisfied that he will retain a genuine economic interest in the Company if it goes into administration even applying a broad test. He will be unable to pursue his claims against the Company. But he will still be able to pursue his claims against the individuals and Lettbel. Moreover, even if he is successful in proving that he was wrongfully dismissed and did not commit a Relevant Bad Leaver Event and he is entitled to enforce the Loan Notes, it is difficult to see how Lettbel will be able to repay them. Likewise, it is difficult to see how his rights under the ratchet in the Articles will have any economic value either.

106. This takes me to Mr Passfield's submission that RCapital has engineered a situation in which he and the other unsecured creditors are out of the money. I

am prepared to accept that the Smith Claims provided an important reason for the Company's decision to promote a restructuring plan to its creditors. I am also prepared to accept that the issue of the Smith Claims in November 2022 dictated the timing of that decision. However, there is insufficient evidence before me to find that JCP has deliberately withheld funding to put Mr Smith out of the money and to deprive him of his shares. Moreover, in my judgment, JCP was entitled to take the view that it was unwilling to advance the balance of the JCP Facility whilst it faced substantial claims and the costs of those claims would be a significant burden on the cashflow of the Company.

107. Nevertheless, I accept that Mr Smith has a legitimate interest in opposing the Plan. Both the Explanatory Statement and the PSL state that one of the reasons for putting forward the Plan was because the Company is unable to defend the Smith Claims. But the effect of the Plan will also be to prevent Mr Smith having those claims heard (as the Company intends). Moreover, he may be in a position to negotiate a settlement of the Smith Claims for value (perhaps significant value) if the Court does not sanction the Plan. This does not put him in the money because it depends entirely on whether JCP will be prepared to continue funding the Company if the Court is not prepared to sanction the Plan. But it does not seem to me to be unreasonable or illegitimate for him to oppose the Plan on the basis that it will deny him the opportunity to be heard or to negotiate a settlement with the Company.

108. Finally, I am not satisfied that Mr Henson will retain a genuine economic interest in the Company if it goes into administration. Mr Henson suggested that he might be able to bring a statutory claim of some kind if the Company went into insolvency proceedings. But there was no evidence before me that this was correct or the amount to which he would be entitled. Moreover, even if he had been able to persuade me that he would have had such a claim, I would not have held that this was a sufficient basis on its own to refuse to sanction the Scheme. But I am also satisfied that Mr Henson has a legitimate interest in opposing the Plan for similar reasons to Mr Smith.

109. I, therefore, find that HMRC has a genuine economic interest in the Company if it goes into administration, even though it would be unable to recover the debts

due from the Company alone and that I can properly attribute weight both to HMRC's vote against the Plan and to its interests. I find that neither Mr Smith nor Mr Henson has a genuine economic interest in the Company even if it goes into administration and I cannot attribute any weight to Mr Smith's vote or their interests for that reason. However, I find that they both have a legitimate interest in opposing the Plan and I consider that I am entitled to take their views into account in the general exercise of the Court's discretion whether to sanction the Plan.

(ii) Fair Distribution of Benefits

110. There is no issue that RCapital and JCP are the principal beneficiaries of the Plan. Apart from £20,000 to be shared between the preferential and unsecured creditors, they will share the entire restructuring surplus between them. JCP will be paid in full and RCapital will obtain ownership of the Group. Both HMRC and Mr Smith submit that this is unfair.

111. Ms Cooke relies on the importance of paying debts to HMRC. She cited *Re Lo-Line Motors Ltd* [1988] Ch 477 where Sir Nicolas Browne-Wilkinson V-C. (as he then was) described Crown debts as "quasi-trust" moneys and expressed the view that failure to pay them is more culpable than the failure to pay ordinary commercial debts: see 487-88. Mr Haywood took me to *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325 where Dillon LJ cast doubt on this passage because the Vice Chancellor had assumed that the failure to pay was prejudicial to employees (when it was not): see 336a-c.

112. I do not accept that Dillon LJ intended to cast any doubt on the importance of paying debts to HMRC. *Lo-Line* was a decision concerned with directors' disqualification and the issue in both cases was whether the failure to pay HMRC debts demonstrated unfitness and, perhaps unsurprising, the Court of Appeal held that it all depends on the circumstances. But Dillon LJ also stated this at 337a-c:

> "Mr. Cruddas made a deliberate decision to pay only those creditors who pressed for payment. The obvious result was that the two companies traded, when in fact insolvent and known to be in difficulties, at the expense of those creditors who, like the Crown,

> happened not to be pressing for payment. Such conduct on the part of a director can well, in my judgment, be relied on as a ground for saying that he is unfit to be concerned in the management of a company. But what is relevant in the Crown's position is not that the debt was a debt which arose from a compulsory deduction from employees' wages or a compulsory payment of VAT, but that the Crown was not pressing for payment, and the director was taking unfair advantage of that forbearance on the part of the Crown, and, instead of providing adequate working capital, was trading at the Crown's expense while the companies were in jeopardy. It would be equally unfair to trade in that way and in such circumstances at the expense of creditors other than the Crown. The Crown is the more exposed not from the nature of the debts but from the administrative problem it has in pressing for prompt payment as companies get into difficulties."

113. I accept that HMRC debts are not trust monies and that HMRC should not be treated as if it were a secured creditor. There was some debate before me whether the Company was causing prejudice or harm to its employees because of its failure to pay PAYE and NICs but Ms Cooke confirmed on instructions that Dillon LJ accurately stated the position in *Sevenoaks Stationers* (above). I accept, therefore, that I should not treat the failure to pay HMRC debts as a moral stain or as evidence that the directors of the Company are either unfit or guilty of misconduct.

114. I also accept that the Court should not refuse to sanction a restructuring plan under Part 26A as a matter of principle because HMRC will be crammed down if the plan is sanctioned. Indeed, in *Re Houst Ltd* [2022] EWHC 1941 (Ch) Zacaroli J was prepared to do just that. Ms Cooke did not suggest that *Houst* was wrong although HMRC were not represented and did not oppose sanction: see [45]. I accept, therefore, that I should not refuse to sanction the Plan as a matter of principle.

115. Nevertheless, I am satisfied that the Court should exercise caution in relation to HMRC debts. It was the Company's statutory obligation to deduct and pay PAYE and NICs to HMRC on behalf of its employees and VAT is a throughput tax which is paid by third parties and for which the Company was also obliged to account to HMRC. It has not complied with these obligations. Moreover, Parliament has recognised the importance of HMRC debts by legislating for some debts to be treated as secondary preferential debts and in the present case

the Company asks the Court to approve the cram down of a preferential debt of £209,703.01. Finally, HMRC debts are also involuntary in the sense that HMRC had not chosen to trade with the Company and, as Dillon LJ recognised (above), the collection of tax is easily open to abuse.

116. For all these reasons it is important that the Court should scrutinise the Plan with care and should not cram down the HMRC unless there are good reasons to do so. I also have well in mind Ms Cooke's submission that the Court should not be seen to approve the non-payment of tax and that if the Court sanctions the Plan in the present case, it will give a green light to companies to use Part 26A to cram down their unpaid tax bills. She also submitted that where a company has been trading at the expense of HMRC, Part 26A could easily be used as an instrument of abuse. I accept that these are both factors which the Court can and should take into account.

117. In my judgment, it would be unfair to sanction the Plan and enable the Company to cram down the HMRC debts totalling £472,308.44 in the present case. In reaching this conclusion, I have taken into account the size of the debt, the fact that £209,703.01 is a secondary preferential debt, the fact that the Group as a whole owes £2,961,674.42 and also that some of these debts go back as far as January 2020. I have also taken into account the fact that HMRC's share of the restructuring surplus if the Plan is sanctioned is both tiny by comparison with JCP and in absolute terms. It seems to me that these are all strong reasons why the Court should be slow to sanction the Plan.

118. Against these considerations I balance the fact JCP is providing new money and the debt to HMRC (whilst large) is not so significant that it should be a sufficient reason by itself to refuse to sanction the Plan. Moreover, there is insufficient evidence to draw the conclusion that the Group has deliberately traded at the expense of HMRC despite the staleness of some of the debts. There is also insufficient evidence to draw the conclusion that the Company deliberately failed to disclose to HMRC the equity sale and refinancing arrangements when negotiating the TTP arrangements in February 2022.

119. In my judgment, what tips the balance against sanctioning the plan in the present case is the Company's failure to agree TTP arrangements with HMRC before putting the Plan forward and asking the Court to sanction it. I say this for the following reasons:

    (1) I am satisfied that the directors of the Company could reasonably have taken the view that it was in its commercial interests to treat HMRC as an essential or critical creditor. Indeed, it is striking that the directors of the Company were not prepared to treat HMRC as a critical creditor when one compares the debts which they do consider to be essential or critical (below).

    (2) But in any event, the HMRC debts have now become critical to the Company's survival and the survival of the Group as whole because HMRC is not now prepared to agree new TTP arrangements unless they include the Company's debts. Mr Haywood did not challenge Mr Donnelly's evidence that he rejected the Company's proposals on the basis that the TTP arrangements should cover the debt of the Group as a whole.

    (3) Mr Haywood did not suggest either that HMRC was not entitled to take this position. TTP arrangements are a concession to the taxpayer and the TTP arrangements agreed in February 2022 covered not only the Group debts but the debts of the Company. Mr Robins gave no reason why the Company was not prepared to negotiate new TTP arrangements on the same basis. Nor did he suggest that the Company would be unable to pay off the debts due to HMRC over time if it had been prepared to treat HMRC as a critical creditor.

    (4) Instead, the directors and the secured creditors appear to have seen the Plan as a convenient opportunity to eliminate the debts which the Company owed to HMRC for a nominal figure and to use the Plan to put pressure on HMRC to agree new TTP terms. In in my judgment, this is not a purpose for which Part 26A should be used.

120. Despite the able submissions of Mr Passfield, I do not consider the Plan to be unfair to Mr Smith and if HMRC had not opposed the Plan or it had provided for

the payment of the debts due to HMRC, I would not have refused to sanction the Plan. I have sympathy for Mr Smith's concern that he will lose the opportunity to litigate most of the Smith Claims against the Company and the possibility to achieve a reasonable settlement with all parties. But I am not satisfied that the Court should properly take these concerns into account in considering whether to sanction the Plan.

121. Again, I do not consider the Plan to be unfair to Mr Henson. I have considerable sympathy for his position that he was an employee of 38 years standing and if he had not been made redundant but had remained an employee of the Company, he would have been entitled to payment in full. But I cannot decide whether his claim for unfair dismissal had merit and even if he succeeds, he will be no worse off if the Company goes into administration. If he had been able to prove that he was deliberately dismissed to avoid paying him off, I might have taken a different view. But there was no clear evidence to this effect.

(iii) Other Factors

122. I have accepted that the directors of the Company intend to file Notice of Intention if I refuse to sanction the Plan. This must be a commercial decision for them when they see this judgment. But even if they do, I can see no reason why JCP could not provide continuing support for the Company and the Group whilst the directors consider whether to put forward a new restructuring plan or to adopt a new strategy. I attach significance to the fact that JCP has not served a demand calling in the JCP Facility. I also attach significance to the fact that there is headroom of approximately £8 million under the existing facility to support the Company if JCP exercises its discretion to do so.

123. Moreover, the Company has not satisfied me that it is at risk of imminent administration if JCP agrees to provide its continuing support and the directors choose not to serve Notice of Intention. It is possible that Western Union might present a winding up petition. But it has not given notice that it intends to do so over the last three months and it was presumably aware that it would be crammed down if the Court had sanctioned the Plan. Mr Haywood submitted that the trade creditors of the Group might press for payment or be unwilling to trade with the

Company if it failed to file audited accounts on a going concern basis by 30 April 2023. I accept that this is a possibility. But, as Ms Cooke pointed out, many companies miss their filing date and continue to trade. Moreover, if JCP is prepared to provide continuing support for the Company, the auditors may be prepared to sign off the accounts.

124. The Company has not demonstrated, therefore, that there is a pressing need to sanction the Plan or that its future is not in the hands of its directors, RCapital and JCP and I am satisfied that they have enough breathing space to reconsider the position. It is obviously a commercial decision for them whether they are prepared to support the Company and, if so, on what terms and whether it is necessary to put forward a new restructuring plan.

125. But even if the Company goes into insolvent administration as a consequence of the Court's failure to sanction the Plan, I take into account the fact that it is not a trading company and that its operating subsidiaries will continue to trade. Mr Henson pointed out that it has only eight employees and I am not satisfied that the administration of the Company will, by itself, prevent its subsidiaries from continuing to trade. Indeed, until the evening of 25 April 2023 the directors' assumption was that the relevant alternative would not involve either the administration of the subsidiaries but a pre-packaged sale of their shares. There is insufficient evidence before me to suggest that this is no longer possible at all.

126. Finally, I take into account the fact that even if I had been prepared to sanction the Plan, there would have been no guarantee that JCP would provide support for the Group until 2029. Mr Haywood did not challenge Mr Passfield's submission that the Company could not achieve an EBITDA of £1,300,404 for the three months ending on 31 May 2023 and would be in breach of covenant almost immediately. Although JCP may be prepared to waive that breach of covenant, Mr Robins' evidence and minutes of the board meeting on 25 April 2023 give me no great confidence that JCP would not enforce future breaches of covenant and put the Company into administration if it could see some benefit or advantage in doing so. I accept Mr Passfield's submission that it is entirely possible that RCapital and JCP will put the Company into administration within months even if I sanction the Plan.

(4) Roadblock

127. In *Virgin Active* Snowden J described a "blot" as a technical or legal defect in the Plan such that its terms are rendered inoperative or ineffective by virtue of their infringement of a mandatory provision of law: see [313]. In *Re Van Gansewinkel Groep BV* [2016] 2 BCLC 138 he also stated that the Court is unlikely to approve a scheme or plan which does not have the effect intended by the company and creditors: see [61]. There is no suggestion that the Plan would infringe a mandatory provision of law. The issue is whether the Plan would be rendered inoperative or inoperable in practice if HMRC refused to agree to TTP arrangements once it is sanctioned.

128. It is common ground that the Group subsidiaries are indebted to HMRC for £2,561,499.38. Mr Robins accepted that the survival of the Group as a going concern was subject to the Company's subsidiaries agreeing TTP arrangements with HMRC. I understood him to mean that if HMRC did not agree TTP arrangements with all members of the Group and enforced its existing liabilities, the individual subsidiaries and the Group as a whole would not survive. Ms Cooke relied on his evidence and submitted that the Plan would be inoperable if HMRC were not prepared to agree terms with the Group.

129. Mr Haywood did not challenge this analysis. He submitted that HMRC were bound to agree to new TTP arrangements once the Plan was sanctioned. He pointed out that there is nothing in HMRC's manual to suggest that HMRC would refuse to agree to such arrangements because the Court had sanctioned a restructuring Plan under Part 26A. In their Skeleton Argument, he and Ms Wilkins also relied on the fact that the Company does not form part of the Group's VAT group. In that context, they made the following submission:

> "The Company does not form part of the Group's "VAT group". Presumably, if the Court sees it fit to sanction the Restructuring Plan, HMRC would not use the fact of sanction as a basis (of itself) for rejecting the TTPA proposals (thereby, effectively, attempting to thwart the effect of the Court's order)."

130. In my judgment, the Company's failure to agree new TTP arrangements is a roadblock which prevents the Plan from taking effect in the manner in which the

Company and its creditors intend. The directors may have hoped or even expected that they would be able to agree terms with HMRC before the sanction hearing. But HMRC has refused to do so and Mr Donnelly's evidence is that this decision was taken because they did not include the Company's debt. In the absence of any application to cross-examine him, I am bound to accept his evidence just as I was prepared to accept the Company's evidence in relation to the board meeting on 25 April 2023.

131. HMRC has not suggested that it intends to commence proceedings to enforce its debts against the Group imminently. But in the absence of a clear commitment from HMRC to give the Group time to pay its debts, I do not see how the Plan can take effect. STB, JCP and other trade creditors may not be prepared to advance further funds without HMRC's commitment to give time to pay. Moreover, the directors of each subsidiary may be at risk of continuing to trade in the absence of HMRC's agreement.

132. Finally, even if I had been prepared to exercise my discretion to sanction the Plan and cram down the Company's debts to HMRC, I would only have been prepared to do so on condition that the Company agreed TTP arrangements satisfactory to HMRC. It is matter of real concern that the directors remain willing to take the risk that HMRC will not agree to TTP arrangements even if the Court sanctions the Plan. If I had sanctioned the Plan unconditionally, this would undoubtedly have put pressure on HMRC to agree terms (as Mr Haywood and Ms Wilkins rightly anticipate in the Skeleton Argument). As I have already indicated, I do not consider this to be an appropriate use of Part 26A.

VIII. Critical Supply Creditors

133. In *Re Virgin Atlantic Airways Ltd* [2020] BCC 997 Trower J accepted that it was appropriate to treat creditors as exceptional who provide goods or services essential for the continuation of the plan company's business or to the implementation of the plan or the recapitalisation of the plan company. For the purposes of the convening hearing he was satisfied that all of the creditors identified by the plan company were essential "for respectable commercial reasons": see [11].

134. It was common ground that the Court should apply this test. Ms Cooke submitted that the relevant creditors had to be essential and Mr Haywood emphasised that I could be satisfied that they were essential if the directors had respectable commercial reasons for classifying them as such. I accept both of their submissions. In my judgment, the Court should generally accept the reasons given by the Company unless it is plain and obvious that the creditors are not essential to the future operation of the plan company or the Company's reasons do not make sense or there is evidence to the contrary.

135. I would not have been prepared to accept that Mr Beech was a critical supply creditor. The debt related to his severance pay and not his future services as a non-executive director or ambassador for the Company. Mr Robins did not explain what he was to be paid for his future services and I assume that he will be paid a reasonable fee for them. There is no reason to believe that he would not have taken a commercial view and agreed to provide the relevant services even if the Company had refused to pay the existing debt.

136. Moreover, there was no obvious reason to treat Mr Beech differently from Mr Henson and Mr Smith and this seemed obviously unfair. Recognising this fact, Mr Haywood told me that the Company was prepared to move Mr Beech from critical supply creditors to unsecured creditors if I sanctioned the Plan. He also told me that Mr Beech had consented to this and supported the Plan. If I had sanctioned the Plan, therefore, it would have been on the basis that Mr Beech was an unsecured creditor but that his re-classification had no other effect on sanction.

137. I am prepared to accept that ADS Group Ltd, ADS Toulouse SARL and SF Recruitment are essential for the continuation of the Company's business on the basis of the explanations given by the Company. These debts amount to £36,947.04 in total and I can see that there is a business case for paying them. Mr Henson made a number of observations about the value of membership of ADS and contributing to office space in Toulouse. But I do not consider that it is appropriate to reject the Company's reasons for treating them as essential without a detailed investigation.

138. I am bound to say, however, that I am surprised at the Company's sense of priorities. I find it difficult to comprehend how the directors who passed the resolution on the evening of 25 April 2023 still considered it essential on the following morning to pay for membership of a trade association, to contribute to the association's offices in France, to pay a firm of recruitment consultants and to pay a former director's severance pay. I find it even more difficult to comprehend how they considered it essential to pay those debts but not the debts to the HMRC especially when the Group's future existence depends on its goodwill.

IX. Conclusion

139. For these reasons I am not satisfied that it is appropriate to sanction the Plan or to give effect to the votes of STB and JCP, Mr Fyfe and the intercompany creditors and against the votes of HMRC and Mr Smith and the opposition of Mr Henson. I am grateful to all three counsel and their instructing solicitors for their hard work and the quality of their submissions. I am also grateful to Mr Henson for his assistance and his insights about the Company and the Group.