UK Restructuring Law: Recent Developments Considered

In this editorial we intend to revisit the toolkit available under UK Corporate Law to facilitate corporate restructuring, in the widest sense of the concept. We last reviewed this subject in the editorial of May 2016 – see [2016] 383 Co L N 1. Things have moved on since then and the varied combination of pressures on corporate finance have produced a mass of litigation. We attempt to review these developments below.

Company Voluntary Arrangements

There has been some increase in numbers over the course of 2018 and 2019. So in 2018 we saw 356 CVAs officially recorded and figures for the first three quarters of 2019 indicate that this outcome will probably be exceeded, as by end of the third quarter some 274 CVAs had been logged. New case law is limited in extent. A significant authority of note is *Wright v Prudential (Re SHB Realisations Ltd)* [2018] EWHC 402 (Ch), [2018] BCC 712. Here Christopher Pymont QC (sitting in the High Court) held that an arrangement under which a landlord sacrificed rent payments during the currency of a CVA but insisted upon recovery of the full amount in the event of the CVA being terminated, did not offend against general principles of Insolvency Law. This ruling should facilitate landlords' participation in CVAs by ensuring that their position enjoys a degree of protection if as part of a CVA they agree to a temporary rent reduction. On the other hand, the landlords' challenge to the Debenhams CVA failed in September 2019 – see *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch), where Norris J held that the "bad" element of the CVA (in particular a term that deprived a landlord of the proprietary right to forfeit a lease) could be severed and thus the residual CVA could be upheld. Landlords could be regarded as "creditors" in respect of future rent and so their rights could be compromised under a CVA. The landlords had not been treated unfairly as compared to other creditors. This pragmatic ruling is to be welcomed. Most recently, James Morgan QC (sitting as a Deputy Judge of the High Court) in *Williams v Carraway Guildford (Nominee A) Ltd* [2019] EWHC 3073 (Ch) has accepted that this interface between landlords' rights and the interests of those proposing a CVA is a rapidly developing area of the Law and there are a number of issues requiring balanced judicial discussion.

The effect of a CVA continues to cause issues in construction industry adjudication cases. As a result we have seen reported litigation in cases such as *Bresco Electrical Services v Michael J Lonsdale (Electrical) Ltd: Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27, [2019] BCC 490 where the Court of Appeal in dealing with two joined appeal cases attempted to clarify the position and made the general observation that in a CVA situation (as opposed to a liquidation scenario) it may aid future trading to allow the adjudication to be enforced by the party undergoing the CVA. Much depends upon the facts of each individual case before the court.

Administration

The uptake numbers here are still disappointing – only 1464 administrations were recorded in 2018. This represents less than some 10% of recorded cases of corporate insolvency, a poor return for a procedure once touted as a successor to liquidation and receivership. Figures for the first three quarters of 2019 suggest that this figure will increase but only by a modest degree. The administration procedure can be a relatively expensive process and in some cases it fails to offer a long term rescue outcome. In many cases, in reality, we are looking at disguised liquidations (and receiverships). There is nothing inherently wrong in that, but it can lead to frustrated expectations on the part of certain stakeholders. There are still issues concerned with the initiation of administration and where administration fails to deliver its promised outcome that can be a recipe for contentious litigation.

The "prepack" is inevitably entwined with the administration regime. There are now voluntary controls on prepacks – see in particular Statement of Insolvency Practice 16, as revised in response to the Graham Report. The courts are firm in insisting that the SIP 16 requirements are satisfied – see here the approach of Snowden J in *Re Moss Groundworks Ltd* [2019] EWHC 2825 (Ch) where the application for an administration order was adjourned pending the provision of further information to the court. After this short adjournment HHJ Eyre QC granted the administration order (see [2019] EWHC 3079 (Ch)) though there was a "penalty" in terms of court costs permitted to be allowed as administration expenses. This should serve as a shot across the bows for future applicants to ensure that the court is well provisioned with background information when the case is initially put before it. The Graham reforms offered the option of having a proposed prepack checked over by an independent practitioner based in the "prepack pool" before proceeding to implement it. But in 2018 only 11% of cases were going to the prepack pool. This had fallen further to 7.5% in 2019. One consequence of this lack of usage of a voluntary procedure may be the introduction of mandatory provisions via legislation. This has long been threatened.

When the out of court procedure for the appointment of administrators was introduced in September 2003 it was hoped that this would remove the need for expensive recourse to the court. Unfortunately, this policy has rebounded and the courts are still being invited to rule on the validity of administrator appointments. Originally we had the post *Minmar 929 Ltd v Khalastchi* [2011] BCC 485 surge of applications to the court – see for example Anderson [2012] 312 Co L N 1 for a summary of this episode. In more recent times, formal difficulties have been revealed by cases such as *Re NJM Clothing Ltd* [2018] BCC 875, *Re Towcester Racecourse Ltd* [2019] BCC 274, *Re Spaces London Bridge Ltd* [2019] BCC 280 (all discussing the timing of appointment) and in *Wright v HMV Ecommerce* [2019] EWHC 903 (Ch), *Edwards v SJ Henderson & Co Ltd* [2019] EWHC 2742 (Ch) and *Re Skeggs Beef Ltd* [2019] EWHC 2607 (all dealing with e-filing). Insolvency Rule 2016 r.12.64 has come into play on some occasions to save the day. But there are still cases where the court has decreed that the appointment was invalid and could not be saved – see for example Re *Sprout Land Ltd* [2019] EWHC 806 (Ch), [2019] BCC 893, where ICC Judge Prentis found that there had been an irregularity in relation to the board meeting at which administrators were purported to be appointed. The courts have done their best to make sense of the law but they have not been helped by the well-intentioned abolition of official Forms.

Challenges to the conduct of administrators continue to engage the courts. Normally, such litigation gets nowhere as the courts defer to the professional judgment of administrators. See *Davey v Money* [2018] EWHC 766 (Ch) as typical of this norm. The exception that proves the rule is *Brewer v Iqbal* [2019] EWHC 182 (Ch), [2019] BCC 746 where ICC Chief Judge Briggs ordered an insolvency practitioner to pay equitable compensation for breach of fiduciary duty.

One phenomenon that needs watching is the trend for big companies to go directly into liquidation rather than pass through administration – Carillion, British Steel and Thomas Cook being the classic examples. Why this is so has attracted much speculation. Were these companies so hopelessly insolvent that no other option presented itself? Is there a problem with the law on disclaimer of onerous assets? There is no single reason, but it is hardly a vote of confidence in the administration process.

<u>Schemes of arrangement, business transfers, etc</u>

We now move to a success story in the UK restructuring portfolio. The general legal framework is to be found in Part 26, and in particular ss. 895-899, of the Companies Act 2006. This is a well-established statutory framework and one that can offer genuine restructuring options rather than "soft landing" liquidations. The courts are keen to ensure that this procedure works effectively: witness the approach of Vos C in *Re Dee Valley Group Ltd* [2018] BCC 486. In deciding whether to sanction a scheme they tend to follow a standard checklist which directs attention both to procedural issues and matters of fairness. There is a two stage process of convening meetings of interested parties and then dealing with the question of judicial sanction. The case law is voluminous and not every case coming before the courts for a direction to convene a meeting or to sanction a scheme has been referenced in this survey below.

There is also a comparable, but specialised, facility under Part 7 of the Financial Services and Markets Act 2000 for what are described as business transfers. A financial institution engaged in such a transfer may apply to the court under s. 107 of the 2000 Act and the court can sanction the arrangement under s. 111 if the requirements of the Act are met. The court enjoys consequential powers under s. 112. There have been a number of FSMA transfer cases, often inspired by the challenges of Brexit to the wellbeing of the financial sector – see for instance *Re UBS Ltd* [2019] EWHC 261 (Ch). The courts have generally been supportive in operating this restructuring jurisdiction. So, a business transfer was approved by Norris J in *Re AMT Mortgage Insurance Ltd* [2019] EWHC 2702 (Ch). For other approvals see also *Re Royal London Mutual Insurance Society Ltd* [2019] EWHC 185 (Ch) and *Re Scottish Widows* [2019] EWHC 642 (Ch), where the s. 112 power was used to tie up loose ends. Guidance on s. 112 was also offered by Zacaroli J in *Re Abbey Life Assurance Co Ltd* [2018] EWHC 3920 (Ch) when sanctioning the insurance business transfer scheme put before him. But not every application to the court succeeds for in *Re Prudential Assurance*

Co Ltd [2019] EWHC 2245 (Ch) Snowden J refused in the exercise of his discretion under s. 111(3) to sanction what was being proposed (a mass transfer of policies from one provider to another). In exercising that discretion the court was entitled to take into account the relative ages and reputations of the companies concerned because this might have affected the decision of the policyholders to invest in a particular provider in the first place (see para 157]. The court stressed that there was no criticism of the companies concerned.

If we can digress for a moment, we should note that the threat of Brexit can produce other protective strategies. A novel idea to deal with Brexit is converting a company into an SE (European company) under EC Regulation 2157/2001. This possibility arose in *Re Liberty Mutual Insurance Europe plc* [2018] EWHC 1445 (Ch) where an English company wished to merge with a newly established Luxembourg company as a prelude to establishing an SE. Morgan J outlined the role of the court under Art 26 in reviewing the proposed merger and made an order giving the green light to the proposed.

Returning to the mainstream, one of the great attractions of the scheme of arrangement is that it can be used to achieve a wide range of restructuring operations involving both solvent and insolvent concerns – see for example *Re Telford Homes plc* [2019] EWHC 2944 (Ch) where Marcus Smith J sanctioned a scheme designed to effect a consensual takeover of a solvent concern. In *Re Charter Court Financial Services plc* [2019] EWHC 2680 (Ch) the scheme was used to effect a merger and was sanctioned by Trower J. In *Re Ophir Energy plc* [2019] EWHC 1278 (Ch) Snowden J sanctioned an uncontested takeover inspired scheme subject to undertakings. The scheme had received solid support from shareholders and the requirements of the law had been met. There were some concerns raised by an investor about the adequacy of the information provided to members but these were discounted by the court because they were raised very late in the day. Other concerns about post approval developments were also regarded as relating to non- material adverse changes.

Debt restructuring designed to fend off insolvency is a common use of Part 26. The scheme of arrangement procedure is available to a distressed company, or indeed to one that is undergoing administration. So, in *Re Lehman Brothers International* [2018] EWHC 1980 (Ch), [2019] BCC 115 Hildyard J sanctioned a scheme proposed by administrators.

Class composition can be a vexed issue when the court is asked to sanction a scheme or indeed to convene meetings of stakeholders. Judicial commonsense and commercial awareness has been to the fore in this regard. Useful guidance is afforded by the *Practice Statement* [2002] 1 WLR 1345. Exact similarity of rights between class constituents is not required; what is essential is an ability to confer together on matters of common concern, or at least the absence of an impossibility of that happening. Moreover, in *Re Noble Group Ltd* [2019] BCC 349, [2018] EWHC 2911 (Ch) and 3092 (Ch) Snowden J confirmed that it is possible to have a class consisting of a single creditor. This is consistent with Corporate Law orthodoxy. The scheme in this case was sanctioned by Snowden J at the end of the day. Snowden J did however take the opportunity to give advice to those applying to the court for the convening of meetings as to what the court viewed as good practice. In *Re Smith & Williamson Holdings Ltd* [2019] EWHC 3021 (Ch) a single meeting of members was ordered to be convened as the differences between members were not so great as to prevent them from conferring together on a proposed merger.

The court is not there to rubber stamp any proposal put to it without due consideration of the underlying law. So in *Re Old Mutual plc* [2018] EWHC 873 (Ch) Snowden J was faced with a proposal that involved the calling of members' meetings. One question related to the class issue and in particular was whether what was being proposed was one scheme or two schemes? This then threw up some complication with Companies Act 2006 s. 641(2A). This 2015 amendment to the Companies Act 2006 was designed to prevent misuse of share cancellation schemes. Eventually, in this particular case, Snowden J was persuaded to grant an order convening member meetings for two schemes but subject to an undertaking that requirements of share capital maintenance and creditor protection were met. The caution of the judge was commendable. In *Re Unilever plc* [2018] EWHC 2546 (Ch) Nugee J made an order convening meetings of members. The order included a provision that the court felt that the scheme fell within the exemption set out in s. 641(2B) of the Companies Act 2006. This was intended to allay concerns about the possible impact of s. 641(2A) of the Act on the rules on reduction of capital. The scheme here was being used here for an integral restructuring and fell within the spirit of the exemption. The issue of s. 641(2B) arose again in *Re Man Group plc* [2019] EWHC 1392 (Ch), [2019] 2 BCLC 495 and Snowden J offered a clear explanation of the purpose behind the amendments made to s. 641 in 2015. Those changes were designed to stop stamp duty tax avoidance through share cancellation as part of a scheme of arrangement. In *Re Steris plc* [2019] EWHC 751 (Ch) Snowden approved a members' scheme which was designed to effect a move of business domicile to Ireland. The scheme was protected from attack under the share cancellation rules as the exemption in s. 641(2B) applied.

A common issue that recurs frequently in recent litigation concerns the jurisdiction of the English courts to make available schemes where there are foreign parties involved. There needs to be jurisdiction with regard both to the company that is the subject of a proposed scheme and also any creditors whose rights are being modified. The EC Recast Judgments Regulation 1215/2012 is thus in play. This problem arises because of the attractions of the English scheme of arrangement procedure to "foreign" corporate customers. The English courts however need to be reassured that their orders will be respected abroad. These matters are best dealt with at the sanction stage of the hearing rather than at the preliminary convening stage – see Snowden J in *Re Noble Group Ltd* (supra) on this sequencing. Looking at some of the reported cases one can get a feel for the reach of Part 26. So, in *Re Agrokor DD* [2019] EWHC 445 (Ch) a Croatian company was looking to use the procedure and creditor meetings were ordered to be convened by Fancourt J subject to minor enhancement of information provision via a website. In *Re Stripes US Holdings Inc* [2019] EWHC 3098 (Ch) the company concerned was incorporated in Delaware.

In *Re Algeco Scotsman PIK SA* [2017] EWHC 2236 (Ch), [2018] BCC 82 Hildyard J sanctioned a debt restructuring scheme. The company was incorporated in Luxembourg, but did have a centre of main interests (COMI) within the English jurisdiction. There may have been a suspicion of forum shopping in this case, but Hildyard J felt that it was not an inappropriate instance of forum shopping simply designed to trigger the jurisdiction of the English courts. There is support for "good" forum shopping in the judgment of Newey J in *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch). Although COMI might be a relevant factor in determining jurisdiction, the critical nexus requirement according to Snowden J in *Re Noble Group* (supra) is that the foreign company has a "sufficient connection" with the English jurisdiction. This is a slightly different criterion. With many finance arrangements being struck in the City of London it is not difficult to establish a sufficient connection.

The problem of the Recast Judgments Regulation 1215/2012 goes away if it can be shown that a creditor has submitted to the jurisdiction of the English court by, for example, lodging a proof of debt – on this point see the comments of Hildyard J in *Re Lehman* (supra). It is also clear from the way the English courts have interpreted Art 8 of the Recast Judgments Regulation 2015/2012 that the presence of <u>some</u> of the creditors who may be affected by the scheme will be sufficient to found jurisdiction – see the approach of Marcus Smith J in both *Re Stripes US Holdings Inc* [2018] EWHC 3098 (Ch) and *Re New Look Secured Issuer plc* [2019] EWHC 960 (Ch) on this matter.

In *Re Synchreon Group BV* [2019] EWHC 2412 (Ch), which involved a debt restructuring designed to improve liquidity, Falk J confirmed that the Recast Judgments Regulation 1215/2012 can apply to schemes of arrangement where there are creditors domiciled in different Member States, but the applicable jurisdiction can be changed by Art 25, which permits parties to identify a jurisdiction which has the right to determine disputes between themselves. This happened here with the result that the English courts enjoyed jurisdiction to sanction the scheme. On this case, note also the earlier proceedings reported in [2019] EWHC 2068 (Ch) in which Falk G agreed to the convening of creditor meetings.

In *Re NN2 Newco Ltd* [2019] EWHC 2532 (Ch) Norris J sanctioned a scheme. Previously in *Re NN2 Newco / Re Politus BV* [2019] EWHC 1917 (Ch) Norris J had agreed to the convening of meetings of creditors as a prelude to the sanction hearing. Here there had been a change in the governing law of the debt so as to facilitate the usage of a Part 26 scheme. In order to satisfy New York creditors an application under Chapter 15 of the US Bankruptcy Code was to be made but sanction was not conditional upon that happening. With regard to a complaint raised by a representative of a different group of creditors, the fact that a majority of creditors had approved the scheme must inevitably mean that a dissenting majority would be disappointed, but that was no reason for the court to deny sanction if it was of the opinion that matters had been handled in a fair manner.

<u>Cross Border Merger Regulations</u>

The EC Cross Border Mergers Directive 2005/56 (now reconsolidated in Directive 2017/1132, arts 118-134) was implemented in the UK by the Companies (Cross Border Merger) Regulations 2007 (SI 2007/2974)(as amended by SI 2015/180). This Directive was designed to facilitate cross border mergers by introducing cooperative judicial measures. These Regulations will cease to operate in the UK after Brexit, if that ever occurs. A solid body of jurisprudence has developed over the past decade. The court enjoys a degree of discretion and can attach conditions to any approval. So in *Re Nielson Holdings plc* [2015] EWHC 2966 (Ch) Norris J approved a cross border merger between Dutch and English companies on the understanding that certain conditions stipulated in the merger were indeed executed.

In the meantime, the English courts continue to engage with this relatively new pan-European restructuring regime. The issue confronting Marcus Smith J on 1 April 2019 in *Re Interoute Networks Ltd* [2019] EWHC 1030 (Ch) was a group reconstruction involving two mergers of some 13 companies. The judge had to grapple with the uncertainties thrown up by a possible Brexit date on 12 April 2019, which placed added pressure on all concerned bearing in mind the required 21 day implementation period. After reviewing the proposed merger methodology, he applied the test devised by Sales J in *Diamond Resorts* ([2012] EWHC 3576 (Ch)) as to the discretion enjoyed by the court thus aligning this jurisdiction with that applicable to schemes of arrangement. Applying that test to the intra group restructuring in this instance (which had little scope for objections to be raised) the cross border mergers were approved with liberty to apply to the court again were Brexit to frustrate matters.

Regulation 16 of the UK Regulations requires pre-merger certificates to be given by the courts of the jurisdictions of both the transferor and transferee. If these are supplied there is a maximum of 6 months allowed for the merger to secure judicial approval. So in *Re MDNX Group Holdings Ltd* [2019] BCC 442 Rose J stressed the importance of the pre-merger certificate; the certificate causing the perceived problem in this instance was from the Scottish court and related to the interpretation of that order. If the certificate is in order, the courts will be reluctant to go behind it. Turning to *Trade Holding PI-UK Ltd* [2019] EWHC 2234 (Ch) the court the court was asked to approve the transfer of a Polish business to an English company. Zacaroli J. was concerned that the position of the Polish creditors was protected and was not minded to give approval, but was persuaded late in the day to confirm the merger as he was supplied with a pre-merger certificate from the Polish court. The requirements of Regulation 16 were thus satisfied. In *Re GET Business Services* [2018] BCC 10 a cross border merger was approved. Also approval of a cross border merger was given by Snowden J in *Re M2 Property Investment Ltd* [2018] BCC 324. The amount of activity (both commercial and judicial) in this field is therefore substantial.

<u>Reform</u>

We may be on the cusp of further UK reform so as to further bolster the restructuring philosophy. So, for instance, we have the idea of a standalone moratorium floated in August 2018 proposals from the DBEIS – see Umfreville [2018] 411 Co L N 1 for analysis. There appears to have been little progress on this front over the past year. We also have to factor in the EU Restructuring Directive 2019/1023 and in particular to reflect upon its possible effect on English schemes of arrangement. This Directive is due to be implemented by Member States by 17 July 2020. The future position of the UK within the EU is still unclear. As far as restructuring is concerned there may be little change in UK law save that so-called “ipso facto clauses” will need to be outlawed. This should assist in rescue operations. The Directive may make English schemes less attractive to EU companies as early restructuring options will be introduced in Member States to cut off the flow of business to English courts. The Dutch, who have recently sharpened their restructuring tools, will seek to corner a growing share of EU restructuring business, and Ireland has similar expectations. The potential in Irish restructuring law under Part 9 of the Companies Act 2014 was illustrated by *Re Ballantyne plc* [2019] IEHC 407 where Barniville J approved of the scheme put before the court.

One blot on the landscape is represented by Re *OJSC International Bank of Azerbaijan (Bakhshiyeva v Sberbank of Russia)* [2018] EWCA Civ 2802 where the Court of Appeal felt constrained by the *Gibbs* rule (*Antony Gibbs & Sons Ltd v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 to limit the effectiveness of a foreign restructuring process by protecting the rights of creditors whose debts were governed by English Law. This parochial approach sits uneasily against the philosophy reflected in many of the scheme of arrangement cases digested above.