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Case No: CR-2022-004557

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

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

Date: 16/05/2023

Before :

MR JUSTICE ADAM JOHNSON

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IN THE MATTER OF THE GREAT ANNUAL SAVINGS COMPANY LTD
AND IN THE MATTER OF THE COMPANIES ACT 2006

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Matthew Weaver KC (instructed by **Shoosmiths LLP**) for the **Applicant Company**
William Willson (instructed by **His Majesty's Revenue and Customs**) for **His Majesty's Revenue and Customs**
Matthew Gillett (instructed by **Judge & Priestley LLP**) for **TotalEnergies Gas & Power Limited**
Ted Loveday (instructed by **Wedlake Bell LLP**) for **Orsted Sales (UK) Limited, Corona Energy Retail 4 Limited and Corona Energy Retail 2 Limited**

Hearing dates: 19, 20 and 25 April 2023

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Approved Judgment

This judgment was handed down at 10am by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Adam Johnson :

Introduction

1. This is an application for sanction of a restructuring plan ("*the Plan*") under Part 26A of the Companies Act 2006 ("*CA 2006*").

2. The Plan is put forward by The Great Annual Savings Company Limited ("*the Company*"). As I will shortly explain, however, the proposed terms of the Plan also affect the Company's sole shareholder, Project Byron Newco Limited ("*the Parent Company*"), and indeed the shareholders in the Parent Company, principally Mr Bradley Groves and his spouse, Lesley Groves.

3. Pursuant to Orders made in February 2023 by Trower J, meetings were held of some 15 classes of creditor ("*the Plan Creditors*") on 13 and 14 March 2023. The results are shown in the Table below. The headline point is that at 12 of the 15 meetings, the Plan achieved 100% support; but in 3 of the 15 meetings, the result was different. At one meeting, there was no attendance at all. At two of the meetings, the vote was positively against the Plan. One such meeting was the meeting of so-called "*Category 3 Energy Suppliers*" (the terminology will become clear below), where the majority vote was against the Plan (66% by value versus 34%). The other meeting was the meeting of a single-creditor class, that creditor being HMRC – in the terminology of the Plan, the "*Second Preferential Creditor*". HMRC voted against the Plan.

4. The full picture on voting at the Plan meetings is as follows:

Plan Creditor Class	**Voting Result**	**Percentage by value FOR**	**Percentage by value AGAINST**
Category 1 Energy Suppliers	**For** the Plan	100%	-
Category 2 Energy Suppliers	No votes submitted	-	-
Category 3 Energy Suppliers	**Against** the Plan	34%	66%
Category 1 Plan Creditors	**For** the Plan	100%	-
Category 2 Plan Creditors	**For** the Plan	100%	-
Category 3 Plan Creditors	**For** the Plan	100%	-
Contingent Plan Creditors	**For** the Plan	100%	-
Secured Creditor	**For** the Plan	100%	-
Secondary Preferential Creditor	**Against** the Plan	-	100%
Head Office Plan Creditor	**For** the Plan	100%	-
Rating Authority Plan Creditor	**For** the Plan	100%	-
Vacant Premises Plan Creditor	**For** the Plan	100%	-
Guarantee Creditor	**For** the Plan	100%	-
Parent Company Creditor	**For** the Plan	100%	-
Connected Party Plan Creditors	**For** the Plan	100%	-

5. In the present application, HMRC and four Category 3 Energy Suppliers oppose sanction of the Plan. The Category 3 Energy Suppliers are TotalEnergies Gas and Power Limited ("*TGP*"), Orsted Sales (UK) Limited ("*Orsted*"), Corona Energy Retail

2 Limited and Corona Energy Retail 4 Limited (together, "*Corona*"). Orsted and Corona made joint submissions and have been referred to together as "*the WB Creditors*".

6. The main issues are as follows.

7. On the face of it, in light of the outcome of the three meetings I have mentioned, which either gave no support to the Plan or were positively against it, there is no power to sanction the Plan under CA 2006 s.901F, because s.901F requires support of all creditor classes, in each case by a 75% majority (by value) of those voting. But that requirement is displaced if the conditions in s.901G are met. In such a case, the sanction power *is* exercisable, even though the relevant majorities were not achieved. That is the *cross-class cram down*. As is now well-known, the two conditions in s.901 G are (A) that the Court is satisfied that none of the dissenting creditors would be any worse off under the proposed plan than they would otherwise be in the "*relevant alternative*" (i.e., the most likely scenario in the event the plan is not sanctioned), and (B) that at least one class of creditor who would receive a payment or have a genuine economic interest in the company in the relevant alternative has approved the plan by a 75% majority.

8. In this case, it is accepted that Condition B is satisfied (see [32] below). But there is a substantial issue about whether Condition A is satisfied, and a substantial dispute about whether, even if it is, the Court should exercise its discretion in favour of sanction.

9. The principal challenge on Condition A comes from HMRC, which argues that in its case, the Company has not discharged the burden of showing that it would not be any worse off under the Plan. A number of points are made, but they come down to this. On the projections put forward by the Company, the return to HMRC under the Plan is only marginally better than the return expected in the relevant alternative. That being so, any viable challenge to the assumptions underlying those projections is likely to give rise to a different outcome, i.e. one in which HMRC is better off in the relevant alternative than under the Plan. On the facts, there are such viable challenges, in particular because the assumptions take too pessimistic a view of likely recoveries in respect of certain book debts in the relevant alternative, and ignore completely the possibility of claims which might be made by insolvency officeholders against third parties.

10. The Category 3 Energy Suppliers also take points on Condition A, and say that they, too, may well be worse off under the Plan than in the relevant alternative. I will come back to their arguments below at [87]-[93].

11. All four objectors also then submit that the Court should exercise any discretion it has against sanctioning the Plan. All say that the Plan operates unfairly. Their positions are different, but involve the same basic complaint, which is that other classes of creditor who in the *relevant alternative* would receive equal or even less favourable treatment to them, are given *better* treatment under the Plan. That is said to be unfair because the better treatment has no proper justification. The point is particularly acute in the case of HMRC, because in the relevant alternative it would have special status as secondary preferential creditor (see now Insolvency Act 1986, Schedule 6, para. 15D). Thus, it would be entitled to recover payment of its debt in priority to payments to other, unsecured creditors, including any of the energy supply companies or other trade creditors of the Company. But under the Plan, this order of priorities is modified, and

indeed some of the unsecured creditors not only receive a dividend (when they would recover nothing in the relevant alternative), but also receive more favourable treatment than HMRC.

Some Necessary Background

General Background and History

12. The Company's main business is as a broker of energy supply contracts between energy suppliers and business users. It makes money through the payment of commissions.

13. I have already mentioned above Project Byron Newco Limited - the Parent Company – and explained that the majority shareholders in the Parent Company are Mr Bradley Groves and his spouse, Lesley Groves. The overall shareholdings are as follows: Bradley Groves (47,858,000 A Ordinary Shares), Lesley Groves (6,445,000 C Ordinary Shares), GF Portfolio Ltd (20,635,000 B Ordinary Shares), Judith Bennison (3,580,000 Ordinary Shares) and Mr Kalliroy Neocleous (1,790,000 Ordinary Shares).

14. Bradley Groves and Judith Bennison are also directors of both the Parent Company and the Company.

15. Historically, the operations of the Company and the Parent Company have been successful, on paper at any rate. In fact, in August 2019, the Parent Company returned a dividend to shareholders of roughly £19m. There is an issue as to how that was achieved, and whether it involved an inappropriately aggressive policy for the recognition of revenue in the form of commissions earned, but resolution of that question is beyond the scope of the present hearing and Judgment.

16. As to funding, there is substantial secured borrowing under an overarching "*Facilities Agreement"* between the Parent Company and a third party lender, Tosca Debt Capital (Luxembourg) S.a.r.l. The Parent Company has been granted (i) two term loans of £9,400,000 each ("*the Term Loans*") and (ii) a £5,000,000 revolving credit facility, of which £4,500,000 has been drawn down ("*the RCF*"). The Parent Company has granted security for the sums due under the Facilities Agreement in the form of an "*all assets*" debenture dated 2 August 2019 ("*the Debenture*"). The Company has acceded both to the Facilities Agreement and the Debenture.

17. Tosca Debt Capital (Luxembourg) S.a.r.l. has appointed Toscafund GP Limited as "*Security Trustee*". In the Plan and in the proceedings before me, Toscafund GP Limited has been referred to as the "*Secured Creditor*."

18. The overall indebtedness to the Secured Creditor presently stands at approximately £28m, and there is an inter-company debt presently owed by the Company to the Parent totalling some £9.1m.

19. In addition there are a number of directors' loans. These include both loans to the *Parent Company* by Bradley Groves, Judith Bennison and Mr Neocleous (totalling about £7.2m), and loans to the *Company* by Mr Groves and Ms Bennison (totalling £1.5m - £1.1m from Mr Groves and £400,000 from Ms Bennison). In the context of the Plan, Mr Groves, Ms Bennison and Mr Neocleous are referred to as the "*Connected Party Creditors*" and their various loans are referred to as the "*Parent Company*

Director Loans" and the "*Plan Company Director Loans*". As will be apparent from the Table at [4] above, the Connected Party Creditors formed their own class for voting purposes.

20. As to the Company's business model, as I have mentioned, this involves the collection of commissions from energy supply companies. Where the Company brokers an arrangement between an energy supply company and a business user, it is paid a commission by the energy supply company. The commission is calculated using the estimated consumption across the contract lifetime multiplied by an uplift applied to the per kilowatt hour standard base rate paid by the end customer. This is referred to as "*Total Contract Value*" or "*TCV*". Typically, such commission is payable up front and booked as gross revenue in the Company's P&L, subject to provisioning to reflect certain risks. Over time, relevant risks have included the risk that the contract with the business user does not in fact "*go live*"; the risk that the actual energy use is less than that projected at the outset; and the risk that the contract does not run its full course. In such cases, commission is usually repayable by the Company. Claims for repayment are referred to as "*clawback*" claims.

21. As can be seen from the Table at [4] above, a number of Plan Creditors are energy supply companies who have clawback claims against the Company. The energy supply companies have been divided into three groups – Categories 1, 2 and 3 (Category 1 receiving the most beneficial treatment under the terms of the Plan, and Category 3 the least beneficial). Included in Category 3 are the present objectors, aside from HMRC, namely TGP, Orsted and Corona.

22. As regards HMRC, as already noted, it is a secondary preferential creditor in respect of certain debts, including those relating to Pay-As-You-Earn ("*PAYE*") income tax, employee National Insurance Contributions ("*NIC*") and Value Added Tax ("*VAT*").

23. The Company has an admittedly chequered history with HMRC. In his written evidence for HMRC, Mr Morrison pointed out that even before the Covid-19 pandemic, the Company had encountered a number of issues in relation to the payment of taxes. Aspects of this were disputed in the Company's evidence. At any rate, what is clear is that compliance became more problematic during the period of the pandemic.

24. Time to Pay arrangements were entered into on three separate occasions, in December 2020, in July 2021 and in November 2021. There were defaults on each occasion. By late September 2022 the outstanding debt to HMRC was approximately £5.9m. HMRC issued a 7 day warning letter, indicating that winding-up proceedings would be commenced if the debt was not paid. It seems it was around this time that the Company instructed insolvency experts for the first time. FRP Advisory wrote on 3 October 2022 asking for a pause in further action. After a further 7 day letter on 12 October 2022, HMRC issued a winding-up Petition against the Company on 21 November. On 30 November, the Company's solicitors issued a Practice Statement Letter, and on 7 December the Petition was adjourned. It remains adjourned pending the outcome of the present application.

25. The Explanatory Statement at para. 11.7(a) sets out what appears to be a concession that the Company's trading has been dependent on a policy of deferring the payment of PAYE and VAT (as well as deferring payments to other creditors). It states:

> "*In addition to the deferral agreements referred to above, the Plan Company has taken the following steps to preserve cash and streamline the business model:*
>
> *a. deferring the payment of certain VAT and payroll taxes …*".

26. As at the date the Plan was initially proposed, HMRC's debt was approximately £6.6m. HMRC is presently owed approximately £7.46m. The debt comprises PAYE, NIC and VAT liabilities which have been accruing now for a number of years.

The Relevant Alternative

27. The Explanatory Statement is dated 20 February 2023. At Appendix 3 it attaches an "*Estimated Outcome Report*", prepared by FRP Advisory.

28. As regards the Company, this identifies a non-going concern sale in administration as the relevant alternative. It also indicates that, since it is a dormant trading company with substantial debt, the relevant alternative will involve the Parent Company being placed into liquidation.

29. Given the overall debt position, these outcomes obviously assume that the shareholdings in the Parent Company and in the Company are presently worthless.

30. As to the Company's creditors, the 15 categories of Plan Creditor have already been mentioned above, in the Table at para. [4]. The outcomes for creditors in the relevant alternative have been calculated by FRP according to both a "*high case*" and a "*low case*".

31. These calculations show that there would be only four "*in the money*" creditors (including HMRC) who would likely recover anything in the relevant alternative. They are as follows:

    i) The Secured Lender. In the "*high case*", it receives 5.2p/£; in the "*low case*" it receives 0.6p/£. These returns are based on fixed charge recoveries (being the sale of the goodwill of the Company) after the costs of realisation. Under the modelling, the Secured Creditor is "*out of the money*" as regards its floating charge.

    ii) HMRC as the "*Secondary Preferential Creditor*". In the "*high case*", it receives 4.7 p in the £; in the "*low case*" it receives 0p/£. These returns are based on floating charge recoveries (after the prior payment of the costs of realisation and payments to the Primary Preferential Creditor – i.e., employees).

    iii) The Head Office Premises Plan Creditor. In both the "*high case*" and the "*low case*" it receives 2p/£.

    iv) The Rating Authority Plan Creditor. In both the "*high case*" and the "*low case*" it receives 1.3p/£.

32. Each of the Secured Creditor, the Head Office Premises Plan Creditor and the Rating Authority Plan Creditor voted in favour of the Plan at the Plan Meetings. Since they are *in the money* creditors, with a genuine economic interest in the Company in the

relevant alternative, it is their votes which enable me to be satisfied that Condition B in s.901G CA 2006 is fulfilled (see above at [8]).

33. All other creditor classes would receive nothing in the relevant alternative, and so are "*out of the money*", with no genuine economic interest in the Company in that scenario. That includes:

   i) all the energy supply companies with clawback or similar claims, whether in Category 1, 2 or 3; and

   ii) the Connected Party Creditors – Mr Groves Ms Bennion and Mr Neocleous,

   all of whom would receive 0p/£ in the relevant alternative.

The Plan

34. The Plan does not involve the injection of any "*new money*", either by the Secured Creditor or by the present shareholders in the Parent Company. Instead, the overall scheme is to reduce the Company's present debt exposure, and then in appropriate cases, to defer payment terms to improve the pressure on cashflow, thus enabling the Company to continue to trade and, over time, return to profitability.

35. It is convenient to look at the treatment of certain creditor classes (and others) in turn.

The Secured Creditor and the existing shareholders/Connected Party Creditors

36. Starting with the Secured Creditor, the terms of the Plan are as follows:

   i) The £18.8m principal due under its two existing term loans is converted into equity in the Parent Company – i.e., it receives 7,200,000 Preference A Shares in relation to £7.2 million of the Term Loans; and 54,3030,000 Preference B Shares in relation to £11.6 million of the Term Loans. These new Shares however are redeemable by the Parent Company (on terms I will mention below).

   ii) The Secured Creditor will write off all accrued interest on its outstanding debt (circa £4.9m).

   iii) As regards the RCF, the proposal is that this is converted into £4.5m term loan, repayable by the Company (again on terms I will mention below).

37. As regards the Connected Party Creditors, the proposal is they will waive all accrued interest, but the principal amounts under their various loans will remain outstanding and will be repayable as set out below.

38. As to repayments to these parties, the proposed structure has been set out by Mr Groves in his Third Witness Statement:

   i) The £4.5m Term Loan and the existing Plan Company Director Loans are characterised as Tranche 1 Debt. The Tranche 1 Debt is only repayable after the Restructuring Completion Date – i.e. after a final distribution has been made to the Plan Creditors – and only if there is "*Surplus Cash*." "*Surplus Cash*" means cash available to the Company after deduction of its aggregate overhead costs for the previous 2 months.

ii) The Preference A Shares in the Parent Company and the Parent Company Director Loans are characterised as Tranche 2 Debt. The Tranche 2 Debt is repayable once the Tranche 1 Debt has been repaid in full. Any redemption of the Preference A Shares by the Parent Company will obviously be dependent on the availability of distributable reserves within the Parent Company, and that in turn will depend on upward distributions made by the Company – i.e. redemption of the Preference A Shares will be dependent on the Company returning to profitability.

iii) The Preference B Shares are characterised as Tranche 3 Debt. The Tranche 3 Debt is repayable only once the Tranche 2 Debt has been repaid in full. If that occurs within three years of the Plan, then the agreed redemption price is effectively £8,220,390.86 (a haircut on the principal debt of roughly £3.4m).

39. As I understand it, the broad effect of these arrangements may be summarised as follows.

40. The effect of the debt/equity swap in favour of the Secured Creditor will be to make the Secured Creditor the owner of just under 50% of the share capital in the Parent Company; but the existing shareholders will remain owners of over 50%, and will return to 100% ownership if the overall group returns to profitability and the A and B Preference Shares are redeemed. If that happens within three years, then the Secured Creditor will recover most (but not all) of the principal presently owing to it, and if it happens after three years, then the Secured Creditor will be repaid its principal in full. It will also recover the full principal amounts presently outstanding under the RCF, but will relinquish any claim to interest. The Connected Party Creditors meanwhile, including the shareholder directors – Mr Groves and Ms Bennison – will also be repaid the full principal amounts owing to them, but they too will relinquish any claims to interest.

41. All that, of course, is premised on the Company (and the Parent Company) returning to a position of profitability. There is obviously risk associated with that, but the projections in the Explanatory Statement (Appendix 7, "*Business Plan Forecast and Viability Report*") are optimistic, and suggest a " *… 'steady state' beyond June 2023 with forecast EBITDA for the year ended 30 June 2024 of £3.1m"*. The projections go on to state that *"[m]anagement are confident that the business will outperform the base forecast*."

HMRC

42. As to HMRC, the Plan proposes establishment of a "*Secondary Preferential Creditor Fund*", into which the Company will make apportioned "*Minimum Monthly Contributions*". Payments will be made out of the Fund in two instalments – the first after 1 year, and the second at the end of 2 years. Overall, the estimated return to HMRC under the Plan is £600,000 – the equivalent of 9.1p/£, assuming a debt of £6.6m.

43. In return, it is proposed there should be a moratorium on any enforcement action by HMRC, unless the Plan is terminated in the meantime. There was some debate before

me as to what events might give rise to termination of the Plan, but I will assume for present purposes that they would include a default by the Company in making any future payments of tax, following sanction of the Plan.

Other in the money creditors

44. The two additional creditor classes who were in the money under the relevant alternative – i.e., the Head Office Premises Plan Creditor and the Rating Authority Plan Creditor - do better under the Plan. The proposal is for the former to receive 20.9p in the £ (versus 2p in the £ in the relevant alternative), and the latter 2p in the £ (versus 1.3p in the relevant alternative).

Critical (and other Creditors)

45. Employees are excluded from the Plan, but beyond that the Plan structure also relies on what are called "*Critical Creditors*". These include the Category 1 Energy Suppliers, already mentioned above, and also "*Category 1 Plan Creditors*". These are not Energy Suppliers but instead other, general trade creditors, such as Apple Retail UK Ltd (which provides IT and telephony services), and Hutchison Catering Limited (which provides office catering). Overall, the Critical Creditors are described in the Explanatory Statement as follows: " *... those creditors of the Plan Company that the Board/management consider essential to enable the Plan Company to continue to trade and who are critical in terms of ongoing contracts*."

46. The proposal is that under the Plan, the Critical Creditors would all be paid in full.

47. The Plan also recognises two other tiers of creditor, below Category 1.

48. The "*Category 2 Energy Suppliers*" and "*Category 2 Plan Creditors*" are described in the Explanatory Statement as not essential but "*revenue generative*." They are given less favourable treatment. For example, the proposal is that Category 2 Energy Suppliers should be entitled to set off existing clawback claims against any future obligation to pay commissions (subject to any excess being paid out at an estimated 2p in the £). This means the total returns to this class of creditor are somewhat uncertain, but with a minimum dividend of 2p/£ and possibly more. The Category 2 Plan Creditors, meanwhile, are estimated to recover some 10p in the £. As Mr Willson pointed out in submissions, that is a better return than HMRC's 9.2p/£ (see above at [42]).

49. Finally, "*Category 3 Energy Suppliers*" and "*Category 3 Plan Creditors*" are deemed "*Non-Critical Creditors*", i.e., "*not essential to enable the Plan Company to continue to trade, nor are they Creditors which will facilitate operational improvements or help return the viability of the Plan Company's business*." Under the Plan, the proposal is for these Non-Critical Creditors – which include TGP, Orsted and Corona - to receive 2p in the £.

Summary

50. An overall summary of the positions of the creditor classes is set out in the Table annexed to this Judgment, copied from the Explanatory Statement at p. 355.

Is the power to sanction available?

51. The issue here is whether Condition A is fulfilled. It is convenient to take the different objectors in turn.

HMRC and Condition A

The Battleground

52. HMRC's case on this topic focused on likely recoveries in the relevant alternative under two heads, i.e. (1) book debts (essentially claims for unpaid commissions), and (2) recoveries in respect of claims against third parties. HMRC's submissions were supported, and in some cases amplified by, the other objectors.

53. To expand a little on these points before moving on, (1) concerns the fact that the Company's largest asset is its "*commission debtor book*" – i.e., claims by the Company for commissions due under brokerage contracts. As at November 2022, the commission debtor book had a headline book value of £18.2m; but in the relevant alternative this is effectively written off, with only a 2.8% recovery (£509,000) in the "*high case*" and zero recovery on the "*low case*."

54. The Company's valuation of the commission debtor book is put forward principally on the basis of a report conducted by Cerberus Receivables Management Limited ("*CRM*" and "*the CRM Report*").

55. As regards Condition A, the context is that on the Company's "*high case*" in the relevant alternative, HMRC would recover £307,000. Under the Plan, HMRC is allocated a distribution of £600,000 over the course of 24 months. The difference is marginal – only £293,000. Thus, argued Mr Willson, the reliability of the CRM valuation is critical to the any worse off analysis, because even if it is slightly wrong, that would be enough to wipe out the £293,000 difference between HMRC's position under the relevant alternative and under the Plan (£293,000 is only about 1.6% of the overall face value of the commission debtor book). Against that background Mr Willson made a number of criticisms of the CRM Report, which I will come on to below.

56. As to issue (2), i.e. claims against third parties which might boost recoveries to HMRC, five such categories of claim were relied on. Mr Willson emphasised that, according to the Estimated Outcome Report, any increase in the recovery of floating charge assets in the "*high case*", and any increase over £93,000 in the "*low case*", would go directly to HMRC as Secondary Preferential Creditor. The suggested categories of claim were as follows:

    i) Wrongful trading under s.214 IA 1986. The possibility of a wrongful trading claim is said to arise because of the evidence of the Company deferring (or defaulting on) payments to HMRC from about March 2020 onwards, which is *prima facie* evidence of the Company's inability to pay its debts as they fell due.

    ii) Preference claims under s.239 IA 1986. Several points are relied on, most particularly three payments totalling £425,000 made to Mr Bradley Groves during October 2022, immediately before HMRC presented its Petition on 21

October, but after it had sent a 7-day warning letter on 27 September threatening to present a Petition failing payment of its outstanding debt.

iii) Misfeasance – breach of duty under CA 2006 s. 172. Here the objecting creditors pointed to possible cross-over claims (i.e., claims for breach of duty arising out of the same matters said to give rise to the wrongful trading and preference claims, and directed at recovery of the same losses). They also pointed to possible stand-alone claims, for example arising out of the decision to pay a further sum of £100,000 to Mr Groves in mid-November 2022, and more significantly, arising from earlier decisions made by the Board of the Company to declare dividends in 2019 and 2020.

iv) As to this latter complaint, the two events relied on are (i) the decision to declare a dividend of £2m in August 2019, but in circumstances where the Company's then available interim accounts showed distributable reserves of only £599,896, and (ii) the decision to declare a further dividend of £2.5m in July 2020 at a time when draft accounts showed profits available for distribution of just over £5m, but based on a revenue recognition policy which later changed (the change having the effect retrospectively of reducing profits for the period in question).

v) Post-petition payments/void transactions. HMRC further submitted that "*it may be*" that in the relevant alternative there would be post-Petition transactions which are automatically void, having regards to s.127(1) IA 1986.

vi) Directors' Disqualification. HMRC also adverted to the possibility of directors' disqualification proceedings under the Company Directors' Disqualification Act 1986, and to the possibility in such proceedings of the Court making a compensation order which could accrue directly to HMRC as the prejudiced creditor, as occurred (though not in relation to HMRC) in Re Noble Vintners Ltd [2019] 2806 (Ch).

57. The Company's case on these points was essentially as follows: (1) the projected returns from the debtor book were supported by the valuation work undertaken by both CRM and FRP, whereas HMRC had put forward no competing expert evidence, only the evidence from one of its own officers Mr Morrison, and in such circumstances the Court should prefer the Company's evidence; and (2) the alleged claims against third parties were simply too inchoate to have any clear value placed on them.

58. Mr Weaver KC also had a further point relevant to Condition A. This was the idea that if the Plan is approved and the Company thus survives to trade, then its future trading will generate taxes which will be collected by HMRC in the future. Mr Groves in his evidence put forward an estimated figure of £9.2m over the course of the 2 year period following approval of the Plan. Mr Weaver KC argued that this future tax revenue was also a benefit, which should be taken into account in comparing the Plan to the relevant alternative; and it gave rise to the necessary conclusion that HMRC would be better off overall under the Plan than it would be in the relevant alternative, because in the relevant alternative the Company would not trade and would pay no further taxes.

The CRM Report and the Debtor Book

59. Starting with the CRM Report, Mr Weaver KC for the Company pointed to the comments made by Snowden LJ in Re Smile Telecom Holdings Ltd [2022] EWHC 740 (Ch) at [53], to the effect that any creditor wishing to oppose a plan based on the contention that the proposer's valuation evidence was wrong, should file expert evidence of its own. Mr Weaver KC said that had not been done here, and in the absence of expert evidence to the contrary, the Court should accept the calculations put forward by the Company. Overall, and even leaving aside future tax revenues, these showed HMRC being obviously better off under the Plan than in the relevant alternative: the relevant alternative provides HMRC with somewhere between nil and 4.7p/£, compared to 9.1p/£ under the Plan.

60. I am not persuaded the matter can be dealt with so straightforwardly.

61. As I see it, the relevant inquiry is really whether the Company has discharged the evidential burden which plainly rests on its shoulders. As everyone was agreed, the burden is on the Company to show, on the balance of probabilities, that HMRC would be no worse off under the Plan than under the relevant alternative.

62. I am not persuaded that in Smile Telecom, Snowden LJ was laying down an invariable rule that, in the absence of expert evidence from an opposing party, the Court is bound to accept the valuation analysis put forward by the Company. That would be too restrictive an approach, and I do not think it was what Snowden LJ intended. In other contexts it is clearly established that the Court can choose to disregard expert evidence put forward by a party, even if the opposing party has adduced no expert evidence of its own: see Griffiths v. TUI (UK) Ltd [2021] EWCA Civ. 1442, [2022] 1 WLR 973. I think a similar principle must apply here. An important part of the Court's function in considering a scheme under Part 26 CA 2006 or a plan under Part 26A CA 2006 is to scrutinise the company's proposals (see Re Amicus Finance plc [2021] EWHC 3036 (Ch) at [23] per Sir Alastair Norris). That must include the possibility of scrutinising the valuation figures the company relies on in light of any criticisms made of such figures, in order to determine whether the burden of proof is nonetheless made out.

63. On this point, the Judgment of Sir Alastair Norris in Re Amicus Finance plc contains the following very helpful passage at [56]:

> *"Where the court is required to be 'satisfied' it is normally so satisfied on the balance of probabilities. ... The dissentient creditor (who bears only an evidential burden of providing a factual basis for his challenge, and does not need to satisfy the Court that the most likely outcome from the relevant alternative is a beneficial return to him) can criticise and seek to undermine what is said to be the more beneficial return to him under the plan. The question then is whether the propounder of the plan can refute that challenge and still satisfy the court on the balance of probabilities that the dissentient creditor would not be any worse off than he would be in the event of the immediate liquidation."*

64. I respectfully endorse that approach, which is effectively the approach HMRC invites me to follow here. I do not see I should be inhibited in doing so by anything said by Snowden LJ in Smile Telecom. While in some cases it may be necessary for an objector to put forward expert evidence even in order to make criticisms of the figures suggested by the proposer of a plan, that will not be so in every case. If, on the face of the materials put forward by the proposer, there are manifest errors, inconsistencies or matters which are not properly explained, it must be open to the Court, having regard to such matters, to conclude that the proposer has not discharged the evidential burden which rests on its shoulders.

65. In this case, having considered the criticisms made of the CRM Report, and the responses to those criticisms made by the Company, I have come to the view that the Company has *not* discharged the burden of showing that HMRC would not be any worse off under the Plan. That is because I am not sufficiently persuaded of the robustness of the conclusions in the CRM Report.

66. CRM's analysis is summarised in the Table below. The short point is that in the "*low case*", the estimated outcome is zero on a debtor book with a face value of £18.2m, and in the "*high case*" is an estimated outcome of only £543,000 after costs of collection (reduced further to £509,000 in FRP's Estimated Outcome Statement):

	Low (£000's)	**High (£000's)**
Total Contract Value	89,546	89,546
GAS provisions for non-receipt	(73,714)	(73,714)
Credit notes	2,368	2,368
Total Commission Debtor	**18,200**	**18,200**
Add back credit balances	1,455	1,455
Bad debt	(302)	(302)
Known clawbacks	(2,325)	(2,325)
Revised Balance	**17,028**	**17,028**
Specific provision	(3,829)	(3,829)
Advance commission provision	(6,411)	(6,411)
General provision	(6,788)	(6,109)
Estimated to Realise	**0**	**679**
Collection cost	0	(136)
Estimated Outcome	**0**	**543**

67. I have a number of serious reservations about this analysis, and do not find it persuasive.

68. To begin with, the reduction in expected recoveries to nil or almost nil is on any view a dramatic one. It contrasts with an estimated recovery under the Plan of roughly £9m in respect of the same group of debts (see the "*GAS Balance Sheet Comparison*" at Appendix 7 to the Explanatory Statement, p. 424).

69. The overall reduction to nil or almost nil is the product of a number of individual provisions, as described by CRM. However, on examination the reasoning underlying these individual provisions is also rather thin and unconvincing. Taking them in turn:

i) The first is a provision for "*Known clawbacks*" (£2,325,000). This covers those cases where energy suppliers have already notified clawback claims in respect of commissions paid. Five cases are set out in Appendix II to the CRM Report. The weakness in this is that it is unclear what form of independent analysis – if any – has been conducted in respect of the Appendix II figures. It seems none, because the Report says merely that the information in Appendix II, which has been provided by the Company, is "*relied upon as factually accurate*." No allowance is made for the possibility that it might be inaccurate, and thus no range of possible recoveries is given.

ii) The same point is applicable as regards the second provision, which is described as the "*Specific provision*" (£3,829,000). According to the narrative, this covers the possibility that commissions presently owed to the Company may not be paid because the relevant counterparties will seek to make clawback claims which will be offset against them. Again, however, the provision is not the product of any independent analysis or assessment conducted by CRM. It is based instead on a list of "*high risk*" debts provided by the Company and attached as Appendix III, which again CRM relies on as being factually correct. There is nothing to say the list has been checked or audited or otherwise subjected to scrutiny. No allowance is made for the possibility that it might be inaccurate, and thus again no range of possible recoveries is given.

iii) The third provision is more substantial – this is the "*Advance commission provision*" (£6,411,000). This is said to cover the possibility that contracts between energy suppliers and customers which have not "*gone live*" at the point of any insolvency event might, if such an event occurs, never go live; and if they do not, then energy suppliers who have already paid commissions might then seek to make clawback claims. Again, the overall provision is based on figures – set out in Appendix IV – presented by the Company, which on the face of it are accepted by CRM without any scrutiny. No allowance is made for the fact that the figures might be wrong, even in part. This is despite the fact that (i) as the Report itself recognises, an insolvency event affecting the Company (as broker) does not obviously affect contracts entered into between the energy suppliers and the business customers as a result of introductions effected by the Company – they may still "*go live*"; and (ii) if they do, neither is it obvious that the Company as broker should be deprived of any commission it has already earned, merely because of its later insolvency. Granted, this question depends to a large extent on the contract terms under which the Company as broker is operating, but it has produced four such sets of terms, and the structure under three of them appears to be that commissions already earned do *not* have to be paid back in light of the Company's later insolvency, even if that results in the brokerage contract being terminated. In the fourth case, the position is more ambiguous, but there are arguments that the same result should follow. In light of this, I again find it surprising that the Company's assessment of zero recovery is accepted without more. There is also an unexplained duplication between the figures in Appendix III and those in Appendix IV, in that two creditors (Supplier 3 and Supplier 4) whose debts have already been the subject of apparently full provisioning in Appendix III are also included again in Appendix IV.

iv) The fourth provision is equally substantial. This is described as the "*General provision*" (£6,788,000 in the low case, and £6,109,000 in the high case). This seems to be a general wrap-up category. The Report refers to a collection of other potentially relevant risks (9 in total), including macroeconomic factors and risks associated with IT infrastructure, but also (again) the risk arising from "*onerous contract clauses in relation to 'clawbacks'*". As to this latter point, I repeat the observations already made above about the sample contracts now provided by the Company. My more general concern is about the overall robustness of the very generalised analysis underlying this final provision. I can understand there might be difficulty in weighting individual risk factors, so that a compendious, overall approach is justified. The difficulty here is that the result of the compendious approach is a final, general provision which wipes out all (on the low case) or nearly all (on the high case) of the remaining value. Elsewhere in the Report (in the "*Commission Debtor Book Summary*" on p. 4), CRM say that their methodology involves applying a series of "*high level assumptions*." That methodology is perhaps most readily apparent in this final provision. The problem though is that is appears to make very little allowance for the possibility that the "*high level assumptions*" might be wrong, even in part. The modelling on its face makes insufficient allowance for what appear to be obvious sensitivities. Thus, I think it legitimate to question its overall robustness.

70. Faced with all this, Mr Weaver KC said that the exercise was necessarily an imprecise and unscientific one. One had to make an allowance for CRM's experience and expertise. I see that and make due allowance for such points, but do not find them persuasive given the fact that the figures put forward appear in most cases to be the Company's figures, unfiltered by any independent scrutiny or analysis. Admittedly the fourth "*General provision*" *does* seem to be the product of an assessment conducted by CRM. However, the compendious approach to that provision accompanied by very little explanation suggests a lack of rigour which is unpersuasive.

71. Mr Weaver KC also emphasised the point that, in assessing whether HMRC is any worse off in the *relevant alternative*, I am presented with a range. He said it would be a mistake to focus on the "*high case*" alone (in which HMRC recovers £307,000), and thus a mistake to assume that because it was projected to recover £600,000 under the Plan, an additional recovery of only £293,000 would be required to make HMRC better off in the relevant alternative. The "*low case*" in the relevant alternative is zero return for HMRC, and if one takes that as the starting point, then a correspondingly larger amount needs to be found from the debtor book to bring the total to £600,000.

72. I entirely follow that point and make due allowance for it. The present exercise itself cannot be an entirely precise one, because one is dealing with alternative scenarios which are necessarily hypothetical at this stage. All the same, even accepting that it may recover more or less in the relevant alternative, I am still not satisfied on the evidence that HMRC would be no worse off under the Plan. I think the evidence has too many limitations to justify that conclusion.

Claims against Third Parties

73. That being my conclusion based on my assessment of the CRM Report alone, strictly speaking I do not need to go on to consider the question of what additional value might be derived from claims against third parties.

74. I accept, as Mr Weaver KC submitted, that there are real difficulties in seeking to evaluate potential claims in contexts such as the present. A number of obvious limitations apply (e.g., the Court has had no disclosure). More generally, a sanction hearing is certainly not the appropriate venue for determining the merits of such claims and the Court should not seek to conduct any sort of mini-trial (see Re Amicus Finance plc per Sir Alastair Norris at [63]).

75. More specifically, as Mr Weaver KC also argued, although on their face the suggested claims (or at least some of them) appear viable, there are some obvious problems and counter-arguments, for example:

i) Wrongful trading. Making out any claim would be dependent on showing that the Defendants had the requisite state of mind, i.e. that they knew or ought to have known at a certain point that there was no reasonable prospect of avoiding insolvent liquidation. That cannot reliably be inferred only from the pattern of late and missed payments HMRC has referred to. There may well be critical documents and other materials in the Company's papers which have not been disclosed.

ii) Preference Claims. There is evidence that the payments made by the Company to Mr Groves were then repaid by him to the Company shortly afterwards: a letter dated 28 October 2022 shows Mr Groves having paid some £450,000 to the Company on 27 and 28 October in order to assist with ongoing cashflow issues. It is argued that in substance the arrangement between Mr Groves and the Company was really a form of revolving credit arrangement, and if that is right, and if the payments made to him during October were made on the basis that they might be repaid (and were repaid), then that would be inconsistent with any intention to prefer Mr Groves in making such payments.

iii) Misfeasance claims. These raise a number of potential complexities. Successfully sustaining a claim under CA s.172 would again have to involve an examination of the subjective states of mind of the relevant directors. The outcome of such claims is inherently uncertain, however compelling the facts may seem initially. The claims relating to payment of dividends are likely to be fact specific. As regards the July 2020 dividend (see above at [56(iv)]), there is a strong argument that the lawfulness of the distribution has to be assessed by reference to the revenue recognition policy in place at the time, and it is not obviously invalidated by any later change in the policy.

iv) Post-Petition payments. HMRC's argument ignores potential defences, including the possibility of a validation order being sought on the basis that payments were made to critical creditors and allowed the Company to continue trading and generating income for the benefit of creditors.

v) Directors' Disqualification. The Court cannot sensibly assess the merits of such a claim or claims at this stage, and the prospect of a compensation order being made so as to create a meaningful benefit for HMRC is entirely unknown.

76. Given such matters, I agree that the exercise of attributing value to the potential claims is extremely difficult. HMRC's position was that in at least some instances there were strong *prima facie* claims (in respect of the wrongful trading allegation and preferences). In the other instances its formulation was more guarded (as regards the misfeasance allegations it referred only to "*potential claims*", and as to the possibly void transactions it said only that there "*may be*" relevant instances). The difficulty is that, as experience shows, even something that appears at the outset to be a strong *prima facie* case can quite quickly, when later facts become known or documents come to be disclosed, turn out to be a claim of negligible or nil value. That makes the exercise of attributing any present value to such claims a fragile and uncertain one.

77. Mr Willson in his submissions sought to encourage an approach which involved assessing the *chance* of a successful outcome, by analogy with the approach in cases where the Court is called on to value the loss of a chance in the negligence context (see, e.g. Perry v. Raleys Solicitors [2019] UKSC 5). This point was raised only late in the hearing, however, and was not the subject of detailed submissions. In any event I have reservations as to whether such an approach is appropriate in the present context. Reliably assessing the value of a lost chance can itself be a complex and time-consuming exercise involving many variables, and in a contested hearing the exercise could quite quickly develop into a form of mini-trial.

78. In light of the above, and bearing in mind the uncertainties and risks always associated with ongoing litigation, I do not consider I can reliably attribute any present value to the alleged claims. I can see there may be proper grounds for thinking they are viable and that there may be a proper basis for bringing them, but that is a different thing.

79. In summary, I prefer to state my conclusion on the no worse off point solely by reference to the CRM Report, and will leave out of account any possible value which might flow from the claims HMRC has identified.

Future Tax Payments

80. Finally, there is Mr Weaver KC's point about the value to HMRC of future tax payments.

81. As to this, Mr Weaver KC sought to rely on the following passages from the judgment of Trower J in Re Deepocean 1 UK Limited [2021] EWHC 138 (Ch), at [34]-[35] (emphasis added):

> " *... it is necessary for me to be satisfied that, if the Restructuring Plan were to be sanctioned, none of the members of the dissenting class (i.e. the DSC Other Plan Creditors) would be any worse off than they would be in the event of the CL&T Group Insolvency Scenario. The primary question for the court when considering what will happen under a restructuring plan and comparing it with what is likely to happen in the relevant*

> *alternative, is to look at the likely financial return in each of the alternative eventualities.*
>
> *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*."

82. Mr Weaver KC emphasised the breadth of the words "*any worse off*". He argued that they require one to look at the overall picture; and undoubtedly, looking at the overall picture, HMRC would be better off under the Plan because of the future tax it could expect to collect if the Company continued to trade.

83. I am not persuaded by Mr Weaver KC's argument, for two reasons.

84. The first is that it assumes that in the relevant alternative, any future tax benefits would be lost to HMRC. I do not think that can be correct. The tax revenues in question are PAYE, NIC and VAT liabilities. If, as the Company's own evidence suggests, its present employees would find work elsewhere in the relevant alternative, and its present counterparties would transact business elsewhere, then the same tax liabilities would continue to accrue to HMRC, albeit from different sources.

85. The second reason is that I think Mr Weaver KC was reading too much into what Trower J said. Although Trower J emphasised the broad scope of the words "*any worse off*", the issue is: *worse off in relation to what*? I think the inquiry Trower J had in mind was whether the relevant class of creditors are likely to be any worse off as regards the existing rights the plan seeks to compromise – hence his reference to "*the impact of the restructuring plan on all incidents of the liability to the creditor concerned*". I accept that is potentially a broad inquiry, but what it seems to involve is a comparison between the financial value which the creditor's existing rights would be likely to produce in the relevant alternative, and the value of the new or modified rights which the proposer of the plan is offering up under the terms of its proposed compromise, in return for the existing rights being extinguished.

86. The point in this case is that the Company's obligation to pay taxes in the future is not an obligation that arises under the Plan: it arises independently, under the relevant tax legislation, and is not being offered up as part of the package of rights made available by the Company by way of compromise of its existing liabilities. I thus consider that the benefits flowing from such future payments are too remote from the Plan to be relevant in applying the no worse off test.

TGP and Condition A

87. I must also deal with the position of TGP. Mr Gillett's argument was that it too was worse off under the Plan than in the relevant alternative. His argument was as follows.

88. TGP's present clawback claims total roughly £3m. It is an *out of the money* creditor, in the sense that in the *relevant alternative,* it would receive no distribution at all. Nonetheless, said Mr Gillett, TGP would be able in the *relevant alternative* to make up at least some of its losses: that is because, in the event of a non-going concern sale in administration, TGP would still be hopeful of the energy contracts brokered by the Company being renewed in its favour. By this means, TGP would hope to make about £2m; and that would reduce its losses to only £1m.

89. Under the Plan, however, the Company would be incentivised to divert any future business in favour of its preferred Category 1 Energy Suppliers, so that TGP would be deprived of the benefit of any contract renewals. In that event, the £2m of prospective new business which TGP would expect to get in the relevant alternative would go elsewhere: and so TGP would end up losing £5m (the present £3m plus the additional future £2m). Therefore, it was likely in practice to be worse off under the Plan to the tune of £4m.

90. I am unpersuaded by this argument. Again, it seems to me the required comparison is between the value of TGP's existing rights against the Company in the relevant alternative, and the value of the new rights offered under the terms of the compromise. It is common ground that TGP's existing rights against the Company would have nil value in the relevant alternative, because it would recover nothing from the Company. Under the terms of the compromise offered under the Plan, it is again common ground that it would recover something better than nothing from the Company – some 2p/£. Neither of those propositions is affected by the fact that in one or other scenario (relevant alternative or Plan), TGP might or might not be able to obtain new rights against third parties which might (or might not) produce additional value for it. In either event, its position vis-à-vis the value of its rights against the Company would be the same.

<u>The WB Creditors and Condition A</u>

91. Mr Loveday also argued that I could not be satisfied that Corona and Orsted would be no worse off under the Plan. His argument was based principally on the likelihood of recoveries from the Company's debtor book and from antecedent claims.

92. I am unpersuaded by this argument, which was raised for the first time during the hearing. The difficulty for Corona and Orsted is that, like TGP, they are a long way out of the money. The shortfall owed to the Secured Creditor in the "*high*" administration scenario is £26,747,000 and in the "*low*" scenario is £28,037,000; and the shortfall to HMRC as secondary preferential creditor is £6,296,000 to £6,695,000. Moreover, on any view of it, returns will accrue to the WB Creditors in the relevant alternative only once HMRC as Second Preferential Creditor has been repaid in full.

93. In such circumstances, and notwithstanding my reservations expressed above about the conclusions in the CRM Report, I accept Mr Weaver KC's submission that there is no real prospect of any payment to the WB Creditors in the relevant alternative. To put it the other way around, as regards these creditors, I think the Company's evidence *is* sufficient to justify the conclusion that, on the balance of probabilities, they would not be any worse off under the Plan and on the contrary are likely to be better off.

Should the power to sanction be exercised in any event?

94. In answering this question, I will assume I am incorrect in my analysis above – i.e. I will assume that the Court does have power to sanction the Plan and that I must exercise my discretion whether to do so.

95. As to the overall approach, the guidance developed in cases involving schemes of arrangement under Part 26 CA 2006 remains relevant, but with appropriate modifications given the different context: see Re Virgin Atlantic Airways (No.2) [2020] EWHC 2376 (Ch) at [45], and Re DeepOcean 1 UK Ltd [2021] EWHC 138 (Ch), at [44]. I will therefore use as a template, with suitable changes, the four-stage approach adopted by Snowden J in a Part 26 scheme case, Re Noble Group Limited [2018] EWHC (Ch) at [17]:

> *"(i) At the first stage, the Court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.*
>
> *(ii) At the second stage, the Court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.*
>
> *(iii) At the third stage, the Court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the Court is not concerned to decide whether the scheme is the only fair scheme or even the 'best' scheme.*
>
> *(iv) At the fourth stage the Court must consider whether there is any 'blot' or defect in the scheme that would, for example, make it unlawful or in any other way inoperable*."

(1) Have the Provisions of the Statute been Complied with?

96. To begin with, I am satisfied that the provisions of the statute have been complied with as have the terms of the convening Orders made by Trower J. To amplify a little:

i) I see no reason to reconsider the matter of class composition which was given consideration by Trower J, and no challenge to it has been suggested.

ii) A point arises because, although the Order of Trower J dated 17 February 2023 required certain newspaper advertisements to be "*placed*" by 5pm on 21 February, they were not in fact published until 22 February. They were however delivered for publication on 21 February. In my view, this was at most a technical infringement. There is nothing to suggest it caused any prejudice. To the extent necessary I will waive it.

iii) A further point arises from the fact that, at the meeting of the Class 2 Energy Supply Creditors, TGP's vote was not admitted. Nothing turns on this however. I am satisfied that the chair acted reasonably in excluding it (the proxy form was submitted only after the stipulated deadline), and even if it had been admitted it would have made no practical difference to the overall outcome which was already a majority vote against the Plan.

iv) HMRC and the other opposing creditors made a number of criticisms of the Explanatory Statement. These included the lack of any clear explanation for the selection and treatment under the Plan of the Category 2 Energy Suppliers and Plan Creditors. Looked at in isolation, I do not consider these points are sufficiently serious for me to refuse to sanction the Plan, but they are material to the overall assessment of fairness I consider below, and I prefer to consider them in that context (see [129]-[132] below).

(2) Was there fair representation at the class meetings?

97. I have already mentioned above the overall pattern of voting and the fact that the statutory majority was obtained in all but three of the 15 creditor meetings. As to representation at the meetings:

i) I am satisfied that all four in the money classes were fairly represented, since in each case as I understand it they comprised only one creditor.

ii) I also consider that no issue arises as regards representation at the meetings of the out of the money classes, although the attendance pattern was mixed. The Contingent Creditors Plan Meeting was poorly attended, but that is likely explained on the basis of indifference rather than it suggesting any logistical or other problem. Similarly, no votes were cast at the meeting of Class 2 Energy Suppliers. In one sense, therefore, there was no meeting at all of that creditor class; but for the reasons I gave in Re Listrac Midco [2023] EWHC 460 (Ch) at [37]-[39] that does not, I think, prevent s.901G CA being engaged and the sanction power under s.901F thus being available. Again, the most likely explanation for the non-attendance is indifference, and I read nothing much into it.

(3) Fairness

98. This is the main area of dispute. All the objectors maintained that the Plan operates unfairly in relation to their interests.

99. In scheme cases under Part 26, the concept of fairness has a particular role and is tested in a particular way. In short, a rationality test is used as a cross-check of fairness where there has been a majority vote in favour of a scheme by a particular class of creditor. The positive vote is not determinative: the Court will also look to the terms of the scheme, in order to assure itself that it is fair to impose it on the dissentient minority. Thus (per David Richards J in Re Telewest Communications plc [2004] EWHC 1466 (Ch) at [21]), the Court asks whether the scheme is one:

> " *...that 'an intelligent and honest man, a member of the class concerned and acting in his own interest, might reasonably approve'*".

100. The present context of course is different (see Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch) at [222]). Where the *cram down* power is sought to be invoked, the relevant dissenting class will have voted against the plan, although other classes will have voted in favour. This is not a matter of imposing terms on a dissentient minority whose interests are materially the same as those of the assenting majority: it is a matter of imposing terms on dissenting creditor class whose interests are different to those of the assenting creditor classes.

101. In some instances, strong overall support for a plan can nonetheless be an important discretionary factor, and if there are *similarities* between the positions of an assenting class and a dissenting class, the vote of the assenting class can help justify the conclusion that the dissenting class *might* rationally have supported the plan, and thus that it is a fair one overall (see DeepOcean, referenced by Snowden J in Virgin Active at [225]). But much will depend on the circumstances of each individual case.

102. In the present case, I do not consider that applying the Telewest rationality test to the majority votes of the classes who supported the Plan helps one evaluate its overall fairness, or that the relatively strong overall support for the Plan is of much assistance. For example, as I have noted, 9 of the 12 classes who voted in favour of the Plan are classes of out of the money creditors: i.e., creditors who would receive nothing at all in the relevant alternative. Under the Plan, each of them will receive a positive return. That being so, it is entirely rational that they should have supported it: their choice was between getting something and getting nothing. In each of their cases, the question posed in Telewest would be answered affirmatively. But in this case that tells one little about the inherent fairness of the Plan and whether it would be right to impose it on a dissenting creditor in a different class with very different interests such as HMRC.

103. As the parties I think recognised, a more pertinent question to ask in such a case is whether the plan provides a fair distribution of the benefits generated by the restructuring between those classes who have agreed to it and those who have not, notwithstanding that their interests are different. If it *does* provide a fair distribution, that is likely to indicate that the negative vote of the dissenting class was not rationally motivated, which would support sanctioning the plan despite the dissent. And the converse is also true: if there is *not* a fair distribution, that is likely to indicate that the dissenting class *has* voted rationally, and that would support the Court refusing sanction.

104. As to what might constitute a fair distribution, I have been assisted in considering this question by helpful articles both by Dr Riz Mokal ("*The Two Conditions for Part 26A Cram Down*" (2020) 11 JIBL 730, and "*The Court's Discretion in Relation to the Pt 216A Cram Down*" (2021) 1 JIBL 12), and by Professor Sarah Paterson of the London School of Economics "*Judicial Discretion in Part 26A Restructuring Plan Procedures*" (January 24, 2022), available at: https://ssrn.com/abstract=4016519 or https://dx.doi.org/10.2139/ssrn.4016519

105. It is advisable not to be prescriptive, but I consider that in the circumstances of the present case at least, it is useful in considering fairness in this general sense to have in

mind the following: (i) the existing rights of the creditors and thus how they would fall to be treated in the relevant alternative; (ii) what additional contributions they are expected to make to the success of the Plan – and in particular whether they are taking on additional risk by making available "*new money*"; and (iii) if they are disadvantaged under the Plan as compared to the relevant alternative, then whether the difference in treatment is justified.

106. To address one of the points canvassed before me in argument, if the question to be addressed is one about the overall balance and fairness of the proposed plan in light of the relative treatment of the different creditor classes, I fail to see why that should not involve comparing the plan with other possible alternative structures. Points of comparison might well be helpful. Indeed, in many cases the basic challenge is likely to be: this is not fair – *things could and should have been done differently*. As I read it, Zacaroli J said something similar in Re Houst Ltd [2022] EWHC 1941 (Ch), because in addressing the question of fairness at [37], he posited an alternative plan structure in which the *cram down* power was sought to be used against the company's bank (rather than HMRC) and not the other way around (as was the case under the plan in that case).

107. Turning back to the analysis, an important reason for considering how creditors would fall to be treated in the relevant alternative was explained by Snowden J in the Virgin Active case as [202]:

> "*That established approach in relation to scheme cases reflects the view that where the only alternative to a scheme is a formal insolvency in which the business and assets of the debtor company would be held on the statutory trusts for realisation and distribution to creditors, that business and assets in essence belongs to those creditors who would receive a distribution in the formal insolvency. The authorities take the view that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which use of such business and assets might generate following the restructuring (the restructuring surplus)*."

108. In the present case, of the 15 creditor classes, only 4 are *in the money*, and of those, the major creditors are the Secured Creditor and HMRC. They are the parties with the most significant economic interest in the Company and as Mr Willson pointed out in his submissions, in terms of the relevant alternative, the overall positions of the Secured Creditor and of HMRC are broadly comparable – the former is projected to recover between 0.6p/£ (low case) and 5.2p/£ (high case), and the latter 0p/£ (low case) and 4.2p/£ (high case).

109. Looked at in that way, one would naturally expect the interests of the Secured Creditor and HMRC to be at the forefront of the Plan. It is principally for them to determine how to divide up any value or potential future benefits which might be generated following implementation of the Plan.

110. The corollary, as explained by Zacaroli J in Re Houst Ltd at [27], is that *"... where creditors or members would receive no payment or have no economic interest in the Company in the event of the relevant alternative, then little regard is paid to their views.*" In the present case, this principle reinforces the view already expressed above

that I should attach little if any weight to the out of the money creditors who voted in favour of the Plan. I think the same result also follows as regards the views of the present objectors aside from HMRC (i.e., TGP and the WB Creditors), since they too are a long way out of the money (see above at [92]).

111. Turning then to consider the treatment and position of HMRC vis-à-vis other creditors and affected parties, there are a number of moving parts.

112. It seems to me a critical point concerns the way the Plan is intended to work. It seeks to stabilise the Company (indeed the overall group including the Parent Company) and to return it to profitability, but this vision does not involve the introduction of any *new money* – i.e., new capital or loan finance. Instead, it is to be achieved via a combination of (a) writing down or deferring payment of the existing debt, and (b) funnelling the limited cash thus made available in the direction of those counterparties who it is thought will be able to contribute to the Company returning to a position where it is operating successfully.

113. This broad approach is made clear in a document entitled "*Great Annual Savings Group: Business Plan Forecast and Viability Report*", attached as Appendix 7 to the Explanatory Statement. This states as follows, at p. 425:

> "*Post Restructuring Plan both parent and trading company balance sheets would be significantly stronger with the eradication of legacy debt built up with HMRC and clawbacks due to Category 3 Energy Suppliers, alongside the conversion of long term £18.8m debt into equity as well as the write off of £6.6m of loan interest. This substantially reduces the debt levels of the Group providing a solid platform for future growth and value creation*."

114. Mr Willson in his submissions naturally emphasised the stated focus on the "*eradication of legacy debt built up with HMRC*."

115. The way the "*solid platform for future growth and value creation*" is then built on is through the priority given, in the post-Plan world, to the Critical Creditors and indeed other *non-critical* Plan Creditors – such as the Category 2 Energy Suppliers and the Category 2 Plan Creditors – who are treated more favourably under the Plan (vis-à-vis HMRC) than they would be in the relevant alternative, on the basis that although not critical, they are likely to be revenue generative.

116. The next question is who is intended to benefit from the intended future growth and value creation, brought about (in material part) by the eradication of HMRC's debt.

117. The issue in terms of the basic fairness of the Plan is that it is not HMRC, whose recoveries are capped at only £600,000 by way of payments from the "*Secondary Preferential Creditor Fund*". Instead, as I see it, the primary beneficiaries are intended to be the Secured Creditor and the existing shareholders/Connected Party Creditors.

118. As to the Secured Creditor, although it will write off all outstanding interest, it is promised payment in full of the £4,500,000 presently due under the RCF, and retains

the potential for recovery in full – or almost in full – of the principal amount of its two existing term loans, if the A and B Preference Shares are redeemed (see above at [38]).

119. True it is that these returns are contingent on the future success of the Company, that they are not certain and thus involve some element of risk. However, the fact remains that such future success is precisely the target the Plan is aiming at, and the prospect of it materialising at all is only made possible by the intended compromise of HMRC's existing liabilities. The Company's projected figures are optimistic and show a substantial growth in its net cash position in the period up to June 2025. Moreover, although there is risk for the Secured Creditor, it is not the risk of losing any *new money*. The Plan is only concerned with existing debt, and in that regard is designed to create an environment in which there is an improved chance of the existing debt being repaid – i.e., a major part of its purpose is to improve the Secured Creditor's existing risk profile.

120. There is then the position of the existing shareholders, and relatedly the position of the Connected Party Creditors.

121. As explained (see [40] above), the structure of the Plan is that although the existing shareholdings in the Parent Company are reduced, the overall vision is for the current shareholders to be resurrected to a position of full ownership once the A and B Preference Shares are redeemed.

122. As to the Connected Party Creditors, including the directors Mr Groves and Ms Bennison, true it is that they also agree under the Plan to forego any claim to interest, but the principal amounts owed to them are not written off and remain, and the vision is that they too will be paid in full in the future when the Company returns to profitability. As with the indebtedness to the Secured Creditor, the effect of the Plan will be to improve the credit risk on these loans (which presently have no prospect of being repaid), so while it is correct that the Plan involves the Connected Party Creditors taking a risk, again that is not risk in connection with any new funding.

123. The treatment of existing shareholders under a restructuring plan can raise particular difficulties. In Virgin Active, the retention of equity by the existing shareholders was justified both on the basis that that was the wish of the senior secured creditors (see at [268]), and on the basis that the existing shareholders were injecting new money (see at [278]). The second of these grounds is obviously not relevant here. The first has some relevance, but must be approached with caution. That is because, although the proposed treatment of the existing shareholders is supported by the Secured Creditor, which presumably has formed the view that retaining engagement of the existing management and ownership team is in its interests, it is strongly opposed by HMRC, the other principal in the money creditor. HMRC has made clear it has no faith in the existing management team and indeed has expressed a strong preference for an insolvency process so that their behaviour and conduct can be investigated. I consider that HMRC's views, which are not accommodated at all under the Plan, should be matters of real weight in the exercise of my discretion. That is particularly so in light of the view expressed above that HMRC has potential claims which appear at least viable, even if I cannot presently place a value on them.

124. As to the comparative treatment of the Secured Creditor and the existing shareholders/Connected Party Creditors on the one hand, and HMRC on the other, Mr

Weaver KC again referred to the possibility of the Company paying future taxes in the event of its continued trading. He said that in this context too, such future tax revenues represented a benefit to HMRC which was relevant to assessing the overall fairness of the Plan.

125. Even if such future tax revenues could be looked at as a relevant benefit, however, that does not in my view result in parity between HMRC on the one hand, and the Secured Creditor and the existing shareholders/Connected Party Creditors on the other. The main point of the Plan as far as the latter groups are concerned is to return the Company to profitability so that their *existing* debts can be substantially repaid, and their present ownership interests resurrected. HMRC's *existing debt* will not be repaid. Instead, it will be almost entirely written off. Whatever the position as regards future tax revenues, therefore, it seems to me HMRC is materially disadvantaged in terms of its existing interests by comparison.

126. The next relevant question is how the planned future growth of the Company is to be achieved. A big part of the answer is by creditors who would stand behind HMRC and recover no dividend in the relevant alternative instead being offered recoveries under the Plan, in some cases at levels more generous than that offered to HMRC.

127. In his submissions, Mr Weaver KC emphasised that there is nothing inherently objectionable in a Plan proposing a different order of priorities than would apply in the relevant alternative. I agree. Part 26A does not seek preserve the order of priorities that would otherwise apply in an insolvency, and other cases have recognised that a different order of priorities can be justified if there is good reason for it - see, e.g. <u>Re Houst Ltd</u> [2022] EWHC 1941 (Ch), [2022] B.C.L.C 1143, per Zacaroli J at [35], where the good reason was the need for critical suppliers to be paid in order for an enhanced dividend to be paid to the unsecured creditors, including HMRC.

128. In my judgment, however, the present case is different, and no sufficiently good reason is given for the structure proposed. Given the extent of the Company's debt to HMRC, one would have expected to see real discernment in the selection of those out of the money creditors selected to benefit under the Plan, effectively at HMRC's expense. Instead, it seems to me the overall structure lacks any real discernment and that the rather muddled re-ordering of priorities is designed to try and promote the hoped for overall growth which will benefit the Secured Creditor and the existing shareholders/Connected Party Creditors, but from which HMRC is excluded.

129. On this topic, HMRC were critical of the selection of the Category 1 Energy Suppliers and Category 1 Plan Creditors (i.e., the *Critical Creditors*). I accept that some of the selections on their face appear questionable (e.g. the selection of Sunderland Association Football Club and the Charities Aid Foundation among the Category 1 Plan Creditors), although on their own such examples would not cause me to decline to sanction the Plan, since I think the Court must accept that such matters are primarily a matter for assessment by management.

130. More concerning, though, is the breadth of those creditor classes who benefit from the re-ordering of priorities, and the scale of the benefits conferred on at least some of them, for reasons which are not clear or which are unconvincing. To take the specific examples provided by Mr Willson in his submissions:

i) The Category 2 Plan Creditors are paid 10p/£ under the Plan, but would recover nothing in the relevant alternative. This is higher than the projected return under the Plan for HMRC (which recovers only 9.2p/£).

ii) The Head Office Premises Creditor is paid 20.9p/£ under the Plan, as opposed to 2p/£ in the relevant alternative.

iii) The Guarantee Creditors are paid 2p/£, when they would recover nothing in the relevant alternative.

iv) The Category 3 Plan Creditors are paid 2p/£, whereas (again) they would recover nothing in the relevant alternative.

131. The treatment of these creditor classes seems difficult to justify, and no or no satisfactory explanation is given. The treatment of the Category 2 Plan Creditors is particularly striking. By definition, they are *not* critical creditors, yet they fare better under the Plan than HMRC. The explanation given for this by Mr Groves in his Third Witness Statement is simply that, "*these creditors will assist the Company with continued revenue.*" This chimes with the stated rationale (again taken from Mr Groves' Third Witness Statement) for the less favourable treatment of HMRC under the Plan, i.e., HMRC "*does not intend to assist the Company with generating any restructuring surplus*."

132. To my mind, these two statements encapsulate the nature of the unfairness inherent in the Plan. They affirm that while the basic idea of the Plan is to provide "*a solid platform for future growth and value creation*", and while the mechanism for achieving that objective involves both the eradication of HMRC's existing debt and prioritising payments to various unsecured creditors at HMRC's expense, the benefits from such value growth as might be achieved are allocated disproportionately to the Secured Creditor and the existing shareholders/Connected Party Creditors. They are the principal beneficiaries under the Plan. In the circumstances, this distribution of benefits to my mind is unfair.

133. In her article referenced above at [104], Professor Paterson explains that although in some cases existing shareholders who retain equity in the restructured business may make an important contribution to the restructuring:

> "*The difficulty, of course, is distinguishing when shareholders are making such a contribution from cases in which shareholders have lined up with other, powerful creditors to capture value which ought properly to have been allocated to the dissenting class … .*"

134. And she goes on to say:

> "*Thus, the concern arises that they [i.e., the existing shareholders] may do a deal with senior creditors in which they retain equity provided they drive a plan which meets the target of the senior creditors*."

135. In my view, these comments have resonance in this case, in light of the conclusions I have expressed about the overall effect of the Plan. The resulting concern reinforces my view that the Plan operates unfairly, and my concern is not assuaged by the fact, emphasised by Mr Weaver KC in submissions, that the Company had sought to communicate openly with HMRC about the Plan, but HMRC had declined to engage. Be that as it may, the end result is still a plan which involves a serious imbalance in the way the anticipated benefits of the restructuring are to be allocated.

136. That being so, I would conclude on this point that the Plan is not a fair one in the relevant sense.

(4) Blot on the Scheme

137. HMRC identified what it called a "*potential blot*" on the Plan, which concerns the scope of the enforcement prohibition in Clause 13 of the Plan (i.e., the scope of the prohibition on the taking of enforcement action by HMRC, which would take effect on the Plan coming into force). In my judgment, however, this was a minor issue, principally of drafting, and would not of itself persuade me to decline to sanction the Plan.

Conclusion on Discretion

138. For the reasons I have given, I consider that HMRC acted rationally in voting against the Plan. Given its status as a major in the money creditor, and the strong terms in which it has voiced its objection, not only in light of the facts of this particular case but also given its critical public function as the collector of taxes, I think HMRC's views deserve considerable weight. Had it been necessary for me to do to, then in all the circumstances described above, I would have concluded that such views were sufficient to tip the discretionary balance against sanctioning the Plan, notwithstanding the positive support it received from the majority of other creditor classes.

Overall Conclusions and Disposition

139. My overall conclusions are as follows:

i) The Company has not discharged the evidential burden of showing that HMRC would not be any worse off under the Plan.

ii) Even had it done so, I would have declined in my discretion to sanction the Plan.

ANNEX

		Restructuring Plan				Administration		Administration	
Creditor Class	**Estimated Claim per EoS (£'000)**	**Estimated dividend from Trust (£'000)**	**Estimated payment through trading (£'000)**	**Total Return within Plan (£'000)**	**Return in RP (p in £)**	**HIGH CASE Recovery (£'000)**	**HIGH CASE Recovery (p in £)**	**LOW CASE Recovery (£'000)**	**LOW CASE Recovery (p in £)**
Secured Creditors	28,206	-	4,500	**4,500**	**16.0**	1,459	**5.2**	169	**0.6**
Primary Preferential Creditors (Employees)	231	-	231	**231**	**100.0**	231	**100.0**	138	**59.9**
Secondary Preferential Creditors (HMRC)	6,603	600	-	**600**	**9.1**	307	**4.7**	-	-
Energy Suppliers - Category 1	uncertain	-	Uncertain	**Uncertain**	**100.0**	-	-	-	-
Energy Suppliers - Category 2	uncertain	Uncertain	-	**Uncertain**	**2.0**	-	-	-	-
Energy Suppliers - Category 3						-	-	-	-
Plan Creditors - Category 1	518	-	518	**518**	**100.0**	-	-	-	-
Plan Creditors - Category 2	86	9	-	**9**	**10.0**	-	-	-	-
Plan Creditors - Category 3 (exc rates)	479	10	-	**10**	**2.0**	-	-	-	-
Plan Creditors - Vacant Premises	399	8	18	**26**	**6.6**	-	-	-	-
Plan Creditors - Head Office Premises	1,186	1	246	**248**	**20.9**	24	**2.0**	24	**2.0**
Plan Creditors - Rating Authority	307	6	-	**6**	**2.0**	4	**1.3**	4	**1.3**
Parent Company (Byron)	9,177	-	-	-	-	-	-	-	-
Connected Parties (Directors)	1,572	-	-	-	-	-	-	-	-
Employees (Unsecured)	1,859	-	-	-	**100.0**	-	-	-	-
Plan Creditors - Contingent (Provisions / Claims)	uncertain	-	14	**14**	**upto 2.0**	-	-	-	-
Guarantee Creditors (Grant claw back)	400	12	-	**12**	**3.0**	-	-	-	-