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Case No: CR-2025-000470

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

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

Date: 11/04/2025

Before :

MR JUSTICE ADAM JOHNSON

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IN THE MATTER OF OUTSIDECLINIC LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

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Matthew Weaver KC and Lauren Kreamer (instructed by **Shoosmiths LLP**) for the **Applicant Company**
William Willson appeared for **HMRC**

Hearing date: 28 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 11 April 2025 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. The decision for the Court in this case is whether to sanction a restructuring plan under Part 26A of the Companies Act 2006. The more precise question is whether to sanction the plan in circumstances where 5 of the 7 relevant classes of creditor have voted in favour of the plan by a majority in value, but one has not, and there is some uncertainty about how the other should properly be characterised (the so-called "*Shop Landlords*" class: see below at [47]).

2. At a hearing on Friday, 28 March 2025 I made an Order sanctioning the plan. This Judgment sets out my reasons why. In summary, the plan received support from a majority by value of all assenting creditor classes, having been given due notice and adequate information to assess the proposed plan; and as to the remaining creditors, it is appropriate to impose the plan on them by way of the *cross class cram-down*, in circumstances where they are all out of the money creditors, have not objected, and the plan in any event appears to involve a fair distribution of the benefits of the proposed restructuring.

Background

3. The company promoting the plan is OutsideClinic Limited ("*OutsideClinic*"). It has operated for many years as a provider of in-home audiology and optometry services.

4. OutsideClinic was acquired by new owners in November 2020. Its parent company is now Optimism Health Group Limited ("*Optimism*"). Optimism, in turn, is owned by a number of private investors, who are its shareholders ("*the Shareholders*").

5. After the acquisition, the newly constituted group embarked on a strategy of making acquisitions. OutsideClinic acquired three subsidiary companies between September 2021 and November 2022: Visioncall Limited, Care Opticians and Bloom Hearing Specialists Limited.

6. The acquisitions were funded partly by capital from the Shareholders but also with debt: Optimism has a facility agreement ("*the Facility*") with a bank, Shawbrook Bank Limited ("*Shawbrook*"). Funds from the Facility were made available to Optimism, but then channelled down to OutsideClinic, creating inter-company debts owed by OutsideClinic to its parent. OutsideClinic has guaranteed repayment of Optimism's indebtedness to Shawbrook, and in support of that guarantee has granted security to Shawbrook, including a debenture of November 2020 containing fixed and floating charges over its assets. Given its security, Shawbrook has also been referred to on this application as the "*Secured Creditor*".

7. In addition to the bank funding, the evidence explains that a sister company of Optimism, Optimism Heath Group II Limited ("*Optimism II*"), advanced sums to OutsideClinic totalling £5,075,713.60 during the period February 2023 to November 2024, for working capital purposes on an unsecured basis.

8. In the event, the acquisitions were more expensive and difficult to manage than anticipated. According to the evidence, other pressures also arose, created by the

trading environment after the Covid-19 pandemic. OutsideClinic made profits in 2021 and 2022 respectively, but then made losses (of £3.07m and £1.11m) in the financial years ended 31 March 2023 and 31 March 2024.

9. OutsideClinic was unable to meet its liabilities to HMRC in respect of (primarily) PAYE and NICs for certain months in 2024, resulting in outstanding liabilities totalling some £1.45m. As at 31 December 2024, the sum owed to OutsideClinic's unsecured creditors was some £5.35m. Shawbrook meanwhile is owed approximately £5.5m under the Facility. Against that background, HMRC said they intended to present a winding-up petition.

10. Faced with the developing crisis, additional emergency funding of £1m was secured from Shawbrook in January 2025. This was in the form of a secured asset based lending facility, guaranteed by certain of the Shareholders. That was enough to buy some time and to put forward the present restructuring plan.

The Convening Hearing

11. There was a convening hearing before me on 21 February 2025. I made an order convening hearings of seven different classes of creditor, including Shawbrook, the Secured Creditor, and HMRC (the "*Plan Creditors*").

The Relevant Alternative

12. The relevant alternative relied on by OutsideClinic is an administration. I accept on the evidence that an administration is the mostly likely alternative if the plan is not sanctioned.

13. The evidence as to outcomes in the relevant alternative is in the form of a report from Interpath Advisory entitled, "*Project Prism – Relevant Alternative Report*". This suggests that in the relevant alternative, the Secured Creditor, Shawbrook, would make a recovery of 0.03p in the £ but the other Plan Creditors, including HMRC, would receive nil (although there would be a partial recovery for the ordinary preferential creditors, i.e., the employees – who are excluded from the plan: see below at [27]). On the Interpath figures, therefore, all Plan Creditors other than the Secured Creditor would be "*out of the mone*y".

Position of HMRC

14. As at the date of the convening hearing, HMRC had indicated they were not supportive of the plan OutsideClinic had put forward. Under the terms of the plan as they stood at that stage, HMRC were to receive a return of 5p in the £. This was the same level of return as proposed for other classes of unsecured creditor, not having priority status as secondary preferential creditor like HMRC.

15. HMRC had reservations about the valuation evidence. They were not convinced that they were, in fact, *out of the money*. They suggested they might wish to rely on their own valuation evidence. Given HMRC's potential challenge, I made a direction for the service of valuation expert evidence in response to that relied on by OutsideClinic.

16. In the event, however, matters moved on between the convening hearing and the sanction hearing, and by the time of the sanction hearing the terms of the plan had been revised to make them more favourable to HMRC. In short, HMRC is now to be offered an additional payment of 10p in the £ (referred to as the "*HMRC Dividend*"), on top of the 5p in the £ offered to the unsecured creditors not having priority status.

17. The rationale for the change is explained in a document circulated to the Plan Creditors on 11 March 2025, referred to as the "*Modification Letter*". At para. 3.2 this provides as follows:

> *"It is accepted by the Plan Company [OutsideClinic], however, that the Estimated Outcome Report [by Interpath Advisory] expressly relies upon various assumptions as to the recoverability of, in particular, books debts, as well as upon certain levels of expenses in the Relevant Alternative. Should these assumptions prove to be inaccurate, it is possible that HMRC will be entitled to a distribution within the Relevant Alternative, in preference to the Unsecured Creditors and ROT Creditors, by reason of its secondary preferential status. It is further acknowledged by the Plan Company that the courts have, in the context of the consideration of restructuring plans and schemes of arrangement, identified the particular importance of HMRC's role as the collector of taxes and its status as an involuntary creditor, not being able to choose to trade with the Plan Company as other Plan Creditors can. This different approach to HMRC suggested by the courts is therefore now reflected in the increased dividend".*

18. In the end, in light of these changes, HMRC did not oppose the plan, and in fact voted in favour of it at the relevant plan meeting.

The Restructuring Plan

19. The plan should be looked at in its overall context. By that I mean that the only creditors affected by the plan are those whose rights are to be modified under it. The rights of certain other parties are not to be modified, and so those parties do not form part of the plan as such; but nonetheless they form part of the overall picture, and thus fall for consideration in understanding how OutsideClinic is proposed to be rescued, and whether the plan should be sanctioned.

The New Money

20. To begin with, following a fundraising initiative started in December 2024, some but not all of the Shareholders have agreed to invest some new capital in OutsideClinic. This is the same group who also guaranteed OutsideClinic's liabilities under the emergency asset based-lending facility from Shawbrook in January 2025. I will refer to this subset of the Shareholders as the "*Investors*". The amount committed now stands at some £2m. This will be used (*inter alia*) to repay Shawbrook the emergency funding (£1m) made available in January, and to fund the payments to the Plan Creditors including HMRC. There are sufficient funds available to ensure that payment of the

HMRC Dividend will not compromise the position of the unsecured creditors more generally, who will still receive the proposed 5p in the £.

21. In return for their injection of new capital, the Investors will be given new shares in OutsideClinic carrying special rights: the "*New Shareholders' Special Shares*". Amongst other benefits, these will carry a preferred return of 120%, payable on a "*Relevant Event*", which includes a "*Listing*" or "*Disposal*", as defined.

The Secured Creditor

22. The next main feature of the restructuring concerns the Secured Creditor, Shawbrook. As noted, it is presently owed some £5.5m under the Facility with Optimism. The Facility is due to expire in November 2025.

23. The proposal under the plan involves a number of steps. To start with, the Facility will be novated to OutsideClinic, and the parent company, Optimism, will be released from any ongoing liability. Optimism will thus no longer need to recover the amount presently outstanding from OutsideClinic as an inter-company debt (some £837,000), which will be written off. Although OutsideClinic will still be liable to repay Shawbrook, under the plan Shawbrook will agree (i) to reduce its outstanding debt by £2m, (ii) to extend the Facility by 24 months to November 2027, and (iii) to grant OutsideClinic a 12 month capital repayment holiday.

24. In return for this package of arrangements, Shawbrook will also be given its own special share in OutsideClinic: the "*Secured Creditor Special Share*". This will entitle it to payment of £2m on occurrence of a Relevant Event (as mentioned above).

25. The overall effect of these arrangements is that if there is a Relevant Event, and assuming there are returns to shareholders, then the first to be paid will be the Investors under their New Shareholders' Special Shares (carrying a 120% return); then Shawbrook under the Secured Creditor Special Share (which would effectively recover the £2m it is presently writing off); then the existing Shareholders (via their continuing interest in OutsideClinic's parent, Optimism).

26. Payments to shareholders will only happen, however, once all indebtedness to Shawbrook has been cleared; and likewise, no dividends are to be paid while any debt to Shawbrook under the Facility is outstanding.

Creditors Falling Outside the Plan

27. To start with, there are a number of creditors described in the Practice Statement letter as absolutely critical to the future operations of OutsideClinic's business. Any outstanding indebtedness to this group will be paid in full. The explanations underpinning the submission that these creditors are critical seem to me to be credible, and none has been challenged by HMRC or otherwise. I need not set out all of them, but to give a flavour they include:

    i) OutsideClinic's bank, Barclays Bank plc, which provides merchant services used in collecting payments;

ii) FODO – the Federation of Optometrists and Dispensing Opticians, which provides malpractice and legal defence insurance;

iii) OutsideClinic's employees;

iv) Locum Creditors – in effect, temporary employees relied on to fill any relevant business needs from time to time.

28. There is then a separate group of creditors, whose interests are being released rather than compromised, and who are not included in the plan for that reason. The most important of these are:

i) Optimism – OutsideClinic's parent company, which is owed £837,800 by OutsideClinic from the funds made available under the Facility, by way of inter-company loan. As noted above, in light of novation of the Facility, Optimism will write off this debt together with outstanding management fees;

ii) Optimism II – Optimism's sister company, which is to write off the circa £5m made available to OutsideClinic for working capital purposes (see above at [7]).

The Plan Creditors

29. As stated above, at the convening hearing I proceeded on the basis that there were 7 classes of Plan Creditor, whose rights were affected by the plan. There has been no challenge to that approach to class composition.

30. As also noted above, on the basis of the Interpath report, of the Plan Creditors only the Secured Creditor stands to make any recovery in the relevant alternative – i.e., only the Secured Creditor will be *in the money* in an administration, together with the employees (who are not Plan Creditors, but who would have preferential status).

31. The effect of the Modification Letter, however, is to acknowledge that there are uncertainties surrounding the assumptions relied on in the Interpath report. In his submissions Mr Weaver KC acknowledged that a relatively small shift in the assumptions as to recoverability of book debts and expenses would give rise to a situation in which HMRC would also be *in the money* – i.e., would make recoveries in the relevant alternative. But he would not go any further on the evidence, because HMRC's debt is £1.45m, and so it would take a material change in the assumptions for anyone else to be treated as an *in the money* creditor. I accept that submission. At any rate, the logic of the overall position reached is clear enough. OutsideClinic and HMRC took advantage of the time between the convening hearing and the sanction hearing to discuss matters further. OutsideClinic has been realistic enough to acknowledge the likelihood of HMRC being shown to be an *in the money creditor* on a contested application, and on that basis the parties have negotiated an improved outcome for HMRC (the HMRC Dividend), which the Investors have agreed can be funded from the new £2m they are advancing.

32. Taking that into account, the seven classes of Plan Creditor are as follows:

i) Shawbrook, the Secured Creditor, whose position is described above. Broadly speaking, it will compromise £2m of debt in return for the Secured Creditor Special Share, and will continue the Facility on revised terms until November 2027.

ii) HMRC, whose position is also described above. It will now receive a total of 15p in the £, including the HMRC Dividend of 10p.

iii) The "*ROT Creditors*" – these are creditors who have the benefit of retention of title clauses. They are offered a recovery of 5p in the £, plus the entitlement in appropriate cases to exercise their rights to reclaim property.

iv) The "*Unsecured Creditors*" – this is the general body of unsecured creditors. The proposal is that they should receive 5p in the £.

v) The "*Shop Landlords*" – there are 4 creditors only in this category, three with relatively small claims for arrears of rent. The proposal is that they should each receive 5p in the £ in respect of such arrears, but otherwise their rights under the relevant leases will remain unaffected.

vi) The "*Swindon Landlord*" – this is the landlord of OutsideClinic's head office premises in Swindon. The proposal here is a little more complicated. OutsideClinic presently occupies two floors in the relevant property, but needs only one. The basic proposal is that as from the date of sanction, OutsideClinic will pay 50% of the usual rent in full, and as to the remainder the Swindon Landlord will be able to claim 5p in the £ as an unsecured creditor for up to a year, subject to a right to terminate the lease on 90 days' notice. The Swindon Landlord will also have an additional right, exercisable on 30 days' notice, to re-let one floor and enter into a new lease with OutsideClinic for the other floor only at 50% of the usual rent.

vii) The "*Onerous Contract Creditor*" – this is an energy company, Smartest Business Energy Limited. There is a fixed term contract expiring in September 2025. The contract will be treated as terminated. The Onerous Contract Creditor will be paid 5p in the £ in respect of any accrued liabilities, and will also be entitled to claim (at the same rate) in respect of any additional liabilities arising from early termination.

33. Additionally, all Plan Creditors save for Shawbrook, the Secured Creditor, may benefit from the "*Restructuring Surplus Fund*". This involves OutsideClinic agreeing to share with the Plan Creditors an additional amount, corresponding to 50% of the amount by which the EBITDA of OutsideClinic exceeds £2m over the period of 12 months after sanction. Mr Weaver KC indicated that on current projections, EBITDA is expected to be in the region of £2,145,000, generating a possible surplus of £72,500.

The Plan Meetings

34. In accordance with the convening order, the plan meetings were held on 17 and 18 March 2025, with the following results:

Plan Creditor Class	**Voting Result**	**% by value FOR (of those present and voting)**	**% by value AGAINST (of those present and voting)**	**% of total creditors voting by number**	**% of total creditors voting by value**
Secured Creditor	**For**	100%	0%	100% (1 of 1)	100%
HMRC	**For**	100%	0%	100% (1 of 1)	100%
ROT Creditors	**For**	100%	0%	100% (5 of 5)	100%
Unsecured Creditors	**For**	100%	0%	10% (17 of 177)	21%
Shop Landlords	**For**	100%	0%	25% (1 of 4)	83%
Swindon Landlord	**For**	100%	0%	100% (1 of 1)	100%
Onerous Contract Creditor	**Abstain**	0%	0%	0% (0 of 1)	0%

Should the Plan be Sanctioned?

General Matters

35. I am satisfied for the reasons given at the convening stage that there is jurisdiction under the statute in the sense that the conditions for application of Part 26A are met – i.e., Condition A is met (OutsideClinic has plainly encountered financial difficulties affecting its ability to continue as a going concern: see CA 2006 s. 901A(2)), and Condition B is met (the plan involves a compromise or arrangement between the plan company, OutsideClinic, and its creditors (or some of them), the purpose of which is to mitigate the financial difficulties OutsideClinic has been exposed to: see CA 2006 s.901A(3)).

36. I see no reason to revisit the question of class composition, which was considered at the convening stage. I am also satisfied that the Explanatory Statement was appropriately clear and comprehensive and suitable for its intended audience.

37. I should mention there was an issue as to notice of the plan meetings, in that the convening order required notice to be sent by first class post as well as by email and via the plan website. Due to an oversight, copies were not sent by post. I am satisfied however that this made no practical difference. The evidence shows that OutsideClinic has email addresses for every one of the Plan Creditors and that, of the emails sent to them, no email bounce back messages were received to suggest that any email had been undeliverable. In four classes of Plan Creditor (the Secured Creditor, HMRC, the five ROT Creditors and the Swindon Landlord), all creditors voted at the plan meetings. As to the remainder: (1) of the 177 Unsecured Creditors, read receipts were obtained for 91 emails (a little over 50%), and 35 creditors accessed the notice via the online creditor portal; (2) OutsideClinic has communicated with all 4 Shop Landlords directly; and (3) the Onerous Contract Creditor opened the email giving notice of its plan meeting and has previously sent email correspondence to the email address set up for Plan Creditors to contact Interpath, so there is little doubt that it received the relevant notice. I therefore consider that adequate notice was given, and would waive any defect arising from the failure to send copies by post.

Who are the Assenting and Dissenting Classes?

38. The procedure described in Part 26A makes a distinction between assenting classes and dissenting classes. The point of the procedure is to allow a restructuring plan to be forced onto a dissenting class, notwithstanding its dissent.

39. What then is an assenting and a dissenting class? The question is an important, indeed fundamental one, because as the Court of Appeal affirmed in In re AGPS Bondco plc [2024] EWCA Civ. 24, [2024] Bus LR 745, at [118]-[147], the exercise of discretion is different, depending on whether one is considering an assenting class or a dissenting class. For an assenting class, the Court will be concerned (*inter alia*) with whether the class was fairly represented at the meeting and whether there was coercion of any minority (AGPS Bondco at [120]). The Court will also apply what has been called a limited rationality test - i.e., it will ask whether the plan is one that "*an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might approve*" (see AGPS Bondco at [122]-[128]). The points are inter-related, in the sense that approval of the plan by a class which is well represented at the relevant meeting gives assurance that the plan *is* one that a rational person would approve of.

40. The same logic does not apply in the case of dissenting classes (AGPS Bondco at [29]): there may have been only a low or perhaps no turnout at the plan meetings, and by definition the meeting will not have shown the requisite degree of approval. Likewise, the fact that approval of the plan by other, assenting classes can properly be described as rational, tells one nothing about the fairness of forcing its terms on other creditor classes who have not supported it. Other approaches are called for, which in AGPS Bondco involved the Court conducting a horizontal comparison – i.e. a comparison of the dissenting class with the position of other classes as a method of testing fairness (see at [148], *et seq*.)

41. Section 901F(1) deals with assenting creditor classes, by describing as follows the basic precondition to exercise of the Court's sanction power under Part 26A:

> *"If a number representing 75% in value of the ... class of creditors ... present and voting ... at the meeting summoned under section 901C ... agree a compromise or arrangement, the court may ... sanction the compromise or arrangement."*

42. Putting it straightforwardly, this seems to me to be saying that an assenting class is one which, at a duly convened meeting, has supported the plan by a majority of 75% in value. Note that unlike the provisions of Part 26 dealing with schemes of arrangement, there is no additional requirement to obtain a majority in number of those present and voting at the relevant meeting. This is one of the features of the plan jurisdiction noted by the Court of Appeal in AGPS Bondco, at [9]. All that is required under s.901F is support by "*a number representing 75% in value*" (my emphasis).

43. The cram-down power is set out in s.901G. The situation in which it can be triggered is defined negatively, as the opposite of the situation described in s.901F(1). Thus, section 901G(1) says that the section applies:

> *" ... if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors ... ('the dissenting class') ... present and voting ... at the meeting summoned under section 901C" (emphasis added).*

44. As the section then goes on to provide, the fact that there is a dissenting class (or classes) does not prevent the Court from sanctioning the scheme, provided certain conditions are met (I deal with these further below).

45. What, then, of the 7 creditor classes in this case? Five are plainly assenting classes: the Secured Creditor, HMRC, the ROT Creditors, the Unsecured Creditors and the Swindon Landlord. In each case, there was agreement by a number representing at least 75% of the class of creditors present and voting.

46. The Onerous Contract Creditor is also, plainly, in its own dissenting class. There was no attendance and no vote, and so the requisite majority was not achieved on any view.

47. What of the Shop Landlords class? As noted above, that class comprises 4 creditors. They have debts of differing sizes. One has a relatively large debt representing 83% of the total sums due to Shop Landlords. The other three landlords are owed only £3,750, £3,000 and £2,649 respectively. At the relevant plan meeting, only the Shop Landlord with the largest claim attended and voted, and voted in favour. Thus, of the Shop Landlords present and voting there was 100% support for the plan; and even among members of the entire class there was 83% support.

48. Notwithstanding that, Mr Weaver KC for OutsideClinic invited me to treat the Shop Landlords as a dissenting class. His logic was that in order for there to be an assenting class under s.901F(1), there has to be a *meeting*, and if there is a class comprising more than one creditor (as with the Shop Landlords), and only one creditor is present either in person or by proxy, then there cannot have been a meeting in the strict sense. In making this point Mr Weaver relied on the approach of David Richards J in a scheme

of arrangement case, Re Altitude Scaffolding [2006] BCC 904, who expressed the view that a meeting logically requires attendance of more than one person (see at [18]), although there is an exception if the relevant class comprises only one member (which in this case explains why the Secured Creditor, HMRC the Swindon Landlord and the Onerous Contract creditor are to be treated as creditor classes who attended a *meeting*).

49. This approach prompted some debate during submissions. It strikes me as somewhat odd to treat the Shop Landlords as a dissenting class, when the plan received 100% support on the day from the largest class creditor whose claim makes up 83% of the overall class by value. It seems counterintuitive to speak in terms of *cramming down* a plan on a group of creditors, the majority of whom by value positively want it to happen; and looking at things in this way seems anomalous when it comes to exercising discretion (see below at [64]). I also note that David Richards J in Re Altitude Scaffolding was dealing with a scheme under Part 26, not a plan under Part 26A, and the different context may be relevant because in the case of the former, but not the latter, there is the additional requirement that the positive vote must be by a majority in number (see above at [42]). Part 26A requires only a positive vote by "*a number*" (not a majority) representing 75% by value; but arguably 1 is "*a number*", and if that is right then in the Shop Landlords' class there *was* a positive vote by *a number* representing more than 75% by value of those who voted, and indeed of the class creditors overall. Perhaps more strikingly, given the positive vote by the largest class creditor, there is no scenario in which a majority by value would *not* have been achieved, even if all 3 of the other Shop Landlords had been present and voted against the plan.

50. In the debate Mr Weaver referred to my earlier decision in Re Listrac Midco [2023] EWHC 460 (Ch). In that case a number of meetings attended by only one creditor were treated as giving rise to dissenting classes, and it was held not to be an objection to that conclusion that there may not have been any *meetings* in the technical sense described in Re Altitude Scaffolding; but in each case, the relevant creditor had either abstained or voted against the plan in question (see at [32]), so the fact pattern in this case, and the point of construction I have referred to, did not arise.

51. These are interesting points, but they arose only during the hearing and were not developed in any detail, and so I agree with Mr Weaver that they are for another day, and another case in which the point matters. Here I do not think it does, because whether the Shop Landlords are considered an assenting or dissenting class (the latter being Mr Weaver's case), it seems to me that one ends up in the same place, as I will now explain.

The Assenting Classes

52. There are five certain assenting classes - the Secured Creditor, HMRC, the ROT Creditors, the Unsecured Creditors and the Swindon Landlord – plus (I will assume for now) the Shop Landlords.

53. For these classes, the relevant statutory majority having been obtained, the questions to address are (i) whether the classes were fairly represented at their respective meetings, and whether there is any evidence of coercion of any minorities; and (ii) the limited rationality test – i.e., whether, as regards each class, the plan is one that an intelligent and honest man, a member of the class concerned and acting in his own interest, might reasonably approve.

54. I see no difficulty about representation at the relevant meetings. The plan meetings for the Secured Creditor, HMRC, ROT Creditors and the Swindon Landlord classes all achieved 100% attendance – i.e. full attendance from all class creditors (most of them being one-creditor classes).

55. There is an issue as to the Unsecured Creditor class, which achieved only a low turnout (only 10% of the overall creditor class by number, and 21% by value). On examination, however, I do not think this a matter of serious concern. The most likely explanation on the evidence is apathy, rather than an inability to vote. One can see that from the fact that although a healthy number of Unsecured Creditors accessed the email giving notice of the plan meetings, or accessed the notice via the plan portal (see above at [37]), only 17 out of 177 actually voted. I agree with Mr Weaver that this is consistent with an attitude of resignation to the idea of recovering 5p in the £ rather than nothing. Neither alternative is likely to engage real enthusiasm. Looked at in that light, the low turnout does not cause me to question the validity of the positive response given by those who did vote.

56. As to the Shop Landlords, the turnout was low in terms of the number of creditors attending (only 1 out of 4), but high in terms of value, which is the key criterion under s.901F(1) (some 83%). That seems to me to constitute fair representation, if it is correct to treat the Shop Landlords as an assenting class.

57. There is nothing to suggest coercion of any minority.

58. Turning then to the limited rationality test, I am entirely satisfied that, as regards each of the assenting classes, the plan is one that an intelligent and honest man, a member of the class concerned and acting in his own interest, might reasonably approve. All the assenting classes are better off under the plan than in the relevant alternative, and so it is entirely logical for them to support it. They have all chosen to do so having had access to the Explanatory Statement and (in the case of HMRC) having had the opportunity to question certain of the assumptions made in OutsideClinic's valuation evidence. There is no good reason to second-guess the commercial assessment they have each made.

The Dissenting Class(es)

59. The approach is different as regards the Onerous Contract Creditor and (on the assumption it should be treated as a dissenting class) the Shop Landlords. These classes need to be *crammed down*.

60. To begin with, two conditions must be fulfilled (see s.901G(2)). I am satisfied that they are fulfilled here. Condition A is that no member of any dissenting class should be worse off under the plan than in the relevant alternative. That is so here. On OutsideClinic's evidence, which I accept, the dissenting creditors would receive nothing at all in the relevant alternative, but they will make recoveries at the rate of 5p in the £ under the plan.

61. Condition B is that the plan must have been approved at a class meeting by a class who would receive a payment, or have a genuine economic interest in the company, in the relevant alternative. That is the case here, because the plan has the approval of the

Secured Creditor, who would receive a distribution in the relevant alternative; and for good measure, by HMRC as well, who might do.

62. That is not the end of the inquiry, however. Even where Conditions A and B are fulfilled, the Court has a discretion to exercise in light of all the relevant factors and circumstances (see AGPS Bondco at [153]), and thus can still decline to sanction the plan. What are the factors in play here? I would identify them as follows.

63. Most importantly, both classes of dissenting creditor (assuming there are two classes) are *out of the money*, and would receive nothing in the relevant alternative. To express it another way, neither of the dissenting classes has any genuine economic interest in OutsideClinic in its current form. Section 901C(4) CA 2006 provides a mechanism under which the requirement to hold class meetings can be waived as regards creditors of that type. That being so, it has been said that when it comes to the Court exercising its discretion, little regard should be paid to the views of creditors who would receive no payment or have no economic interest in the plan company in the relevant alternative (see per Zacaroli J (as he then was) in Re Houst Ltd [2022] EWHC 1941 (Ch) at [27]). In Virgin Active [2022] 1 All ER (Comm) 1023, Snowden J (as he then was) said the following at [249] (in a passage later cited with approval by the Court of Appeal in Re AGPS Bondco at [251]) (emphasis added):

> *"The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was 'unfair' or not 'just and equitable' to them and should not be sanctioned. That point was made expressly by Trower J at the end of para 51 of his judgement in DeepOcean."*

64. Here, as it happens, neither of the dissenting classes has spoken out against the plan or suggested it is in any way inequitable. Indeed one such class – the Shop Landlords – is positively in favour of it, by over a 75% majority in terms of the overall value of that class. The other class – the Onerous Contract Creditor – has abstained and said nothing. There is nothing in this fact pattern which gives rise to a concern that the plan may operate unfairly and that the compromise it represents should not be *crammed down* onto the dissenting classes. In fact quite the opposite. If the correct approach is to attach little weight to the views of *out of the money* dissenting creditors even if they voice objections, it would be perverse to refuse sanction in a case where the out of the money dissenting creditors are either agnostic (the Onerous Contract Creditor), or positively want to be crammed down (the Shop Landlords).

65. That seems to me sufficient to justify exercise of the discretion in favour of cram-down and sanction, but Mr Weaver KC also drew my attention specifically to the position of the Shareholders, who will retain their shareholdings in Optimism and thus (indirectly) their interests in OutsideClinic (see above at [25]). Mr Weaver indicated that in some cases it has been questioned whether, in assessing the overall fairness of a plan, the

Court should conduct some form of horizontal comparison between the position of the unsecured creditors and the shareholders, and ask whether it is justified for the interests of the former (who would stand in priority to the shareholders on insolvency) to be compromised, while the interests of the latter effectively remain intact (as here, since the Shareholders are to retain their existing shareholdings though they are devalued: see again at [25] above).

66. On this point, though, it seems to me the answer is the same as that given by Snowden J in the Virgin Active case, and summarised in AGP Bondco at [252], namely that this is an outcome that all the in the money creditors (Shawbrook and, I will assume, HMRC) are content with. There are no doubt good commercial reasons for that, including the fact that at least some of the Shareholders (i.e., the Investors) are making new money available to help fund the plan. If the *in the money* creditors are happy to live with that as a plan structure, and to the extent necessary compromise their own interests in order to achieve it, it seems entirely fair to cram down that same compromise on out of the money classes who are not giving up anything and who in any event have raised no objections of their own.

Is there a blot or defect in the plan?

67. Finally I am satisfied there is no blot or defect in the plan which would make it unworkable or inhibit its proper operation. None has been identified by OutsideClinic or suggested by any of the Plan Creditors, and none has occurred to me.

Conclusion

68. OutsideClinic's restructuring plan is an appropriate one for sanction. As noted at the beginning of this Judgment, an Order to that effect has already been made.