Willkie Advises on First UK Restructuring Plan of Regulated Healthcare Operator

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On 22 February 2023, the English High Court sanctioned restructuring plans under Part 26A of the Companies Act 2006 ("**CA 2006**") of seven English companies within the Lifeways Group – the largest provider of supported living services for adults with complex health needs, including brain injuries, physical and learning disabilities and autism, in the UK (the "**Group**"). Willkie's London Business Reorganization and Restructuring team advised the Group. The case is chiefly notable for being the first successful use of a restructuring plan by a UK healthcare regulated business. Following the sanction order, the Group was able to complete its restructuring transaction with its secured lenders on 24 February 2023, which involved a c. £100 million haircut of its senior secured debt, the provision of £15 million new super senior money and the consensual transfer of the Group's ownership from OMERS (the Ontario Municipal Employees Retirement System) to the Group's lenders. A link to the sanction judgment is here: *Re Listrac Midco Limited & Ors* [2023] EWHC 460 (Ch).

The restructuring plans ("**RPs**") compromised the Group's landlords, splitting them into three categories based on whether the lease was operating but over-rented (in which case, a rent reduction to market rent was applied) or non-operational/of no future use to the Group (in which case, all liabilities were released and reduced to nil), as well as a wide variety of general unsecured creditors – including claims owed to certain of the Group's former professional advisers and former members of its senior management.

For four of the companies concerned, the requisite voting thresholds of 75% in value of those present and voting per class of creditors were met. For the other three companies, voting thresholds were not met and the Court was accordingly asked to sanction the RPs by exercising its cross-class cram-down powers under section 901G

of the CA 2006. All of the companies were incorporated and headquartered in England, so no cross-border recognition issues arose.

First RP of a CQC-regulated group

The Group's services are regulated by the Care Quality Commission ("**CQC**") in England, the Care Inspectorate in Scotland, and the Care Inspectorate Wales. The CQC has statutory powers to intervene in the operations of a UK healthcare business if it risks entering a formal insolvency process. Willkie worked closely with the CQC throughout the restructuring transaction to ensure the regulator understood and supported the process. The successful restructuring allows the Group (which employs around 10,000 people) to avoid a formal insolvency process and enables it to continue delivering specialist care services to some 4,200 vulnerable adults across the country.

Shareholders are not affected by a plan unless their economic rights are diluted

Sanction of the RPs allowed one of the companies, Listrac Midco Limited ("**Midco**"), to transfer 100% of its shares in the underlying Group to the Group's lenders. Midco will subsequently be wound-down on a solvent basis. At the convening hearing on 17 January 2023, the Group's former CEO unsuccessfully sought to include certain minority shareholders of Midco as an additional voting class in Midco's RP but, in a judgment handed down by Trower J, the Court rejected this and distinguished this case, on the facts, from that of *Re Hurricane Energy Plc* [2021] EWHC 1418 (Ch) and clarified the circumstances where shareholders of a company will be affected by a RP. In Midco's case, the minority shareholders concerned were beneficiaries of the Group's management incentive plan ("**MIP**"). The Court accepted the companies' submissions that the restructuring transaction would return no value to such shareholders under the terms of the MIP, and that their economic rights to participate in capital and profits of Midco would not be diluted by the implementation of the RPs. Those shareholders would continue to hold their shares in Midco following the restructuring transaction. In such circumstances, the Court ruled that shareholders will not be "affected" by a RP and therefore do not need to be summoned to vote on its terms. In addition, the Court confirmed that the decision by the plan companies to share the RP practice statement letter with the MIP shareholders, out of an abundance of caution and 21 days in advance of the convening hearing, had been prudent (even if not strictly necessary) to afford them sufficient time to consider whether they were "affected" by the RPs or not. A link to the convening judgment is here: *Listrac Midco Ltd & Ors, Re* [2023] EWHC 78 (Ch)

Inquorate creditor meetings are not a block to sanctioning

Adam Johnson J's sanction judgment, in a judgment handed down on 3 March 2023, crystallises the Court's power to exercise a cross-class cram-down on creditor classes who dissent, abstain or fail to attend the RP

meetings, providing welcome confirmation that a RP cannot be defeated by classes of creditors who, through apathy or other reasons, refuse to vote or attend the plan meetings to which they have been summoned under section 901C of the CA 2006 (provided there is an 'in the money' supporting class to utilise a cram-down). As Adam Johnson J noted in his sanction judgment: "*where there is a dissenting class, all that is required under s.901G(1)* [the cram-down power] *is that a meeting of the dissenting class has been "*summoned under section 901C*"* [...] *I think that conclusion is consistent with the policy and logic of the cross-class cram down. Were it otherwise, dissenting creditors could disable the operation of the cram down machinery simply by deciding not to attend and vote at the relevant class meeting.*"

However, inquorate meetings still remain a risk for sanctioning schemes of arrangement under Part 26 of the CA 2006 (following the decision in *Re Altitude Scaffolding* [2006] BCC 904).

Cram-down power confirmed where dissenting classes are clearly *out of the money*

The Court sanctioned three of the seven RPs using the Court's discretionary power under section 901(G) of the CA 2006 to cram-down dissenting classes, on the grounds that the 'in the money' secured creditors unanimously voted in favour of the RPs. The result is that the RPs are now binding on certain classes of landlords and unsecured creditors who either opposed the RPs or who did not attend the creditor meetings. Detailed valuation evidence for the Group was provided by FRP Valuation Services Limited, which Ernst & Young LLP used to calculate estimated creditor recoveries in the relevant alternative to the RPs – being a pre-pack administration sale for five companies and a liquidation for the other two companies. The companies' evidence clearly demonstrated that value broke in the Group's secured debt, enabling the votes in favour of secured lender classes to cram-down the dissenting / inquorate classes. As the Court's sanction judgment observed: "*The headline point is that in the relevant alternative… the value break is within the secured debt. In respect of each Plan Company, the returns to unsecured Plan Creditors of whatever type would be entirely dependent on the prescribed part under s.176A of the Insolvency Act 1986 … The result, as Mr Smith KC submitted, is that the unsecured Plan Creditors are all "*out of the money*" creditors, meaning that they have no genuine economic interest in any of the Plan Companies.*"

Reaffirmation of ability to use a plan to wind-down and not rescue a company

The purpose of the Midco RP was to facilitate its solvent wind-down and eventual dissolution (similar to the RPs sanctioned in *Re Deep Ocean 1 UK Limited* [2021] Bus LR 632) ("**Deep Ocean**"), whereas the purpose of the other six RPs was to enable the companies to continue trading as going concerns. The Court reaffirmed its findings in *Deep Ocean* that use of a RP for this purpose was consistent with the purpose of the legislation, thereby ensuring that RPs continue to be a broad tool for distressed situations.

The success of the RPs was due in part to the clear and unequivocal evidence that the RPs provided a better return to plan creditors than they would have received in the relevant alternative of an administration or liquidation.

Classes and Voting

The RPs convened twenty-two plan meetings across the seven plan companies, with the secured lenders voting as the secured creditor class at each company. While some classes voted against the RPs or were not attended by more than one creditor, there was broad creditor support for the RPs overall. As the Court's sanction judgment observed: "*The overall pattern in fact shows much positive support for the Plans, and otherwise is one of understandable resignation by unsecured creditors having no real economic interest in the Plan Companies.*"

Stakeholder	Treatment under RPs
Secured Creditors	SFA amended and restated to: reduce senior debt by c. £100 million, inject a new £15 million term loan facility on a super senior basis, and extend the maturity date by 3.5 years.
Landlords	Divided into three classes, with Class A leases applying rent reductions for a three-year period to bring rent into line with market rates, and Class B1 and B2 leases having rent reduced to zero in return for payment of 110% of the estimated outcome in the administration alternative (the only difference between B1 and B2 leases was that B2 leases had been sub-let). The RPs included 'break rights' for all landlords to take back and re-let their properties. Landlord guarantee claims were compromised in line with the treatment of the underlying Class A or B lease.
Other unsecured creditors	Claims of certain unsecured creditors, including property-related liabilities, intercompany debts owed to corporate shareholders, claims from certain landlords not otherwise affected by the plan in the event that they exercised forfeiture rights within a certain time period post-sanction, former legal advisers and former financial advisers (whose engagement had been terminated and were not acting on the restructuring) were released in full in return for payment of 110% of the estimated outcome in the administration or liquidation alternative.

Looking forward

The Court's sanction judgment in *Re Listrac Midco Limited & Ors* [2023] EWHC 460 (Ch) has set a precedent for how restructuring plans under Part 26A of the CA 2006 can be used effectively in the UK's regulated healthcare sector. Following this successful outcome for the Group, the UK restructuring industry could see an increased use of RPs for companies in this sector, which has experienced significant financial and staffing pressures as a result of the COVID-19 pandemic, reductions in local authority funding and the current high inflationary / high energy price environment. As the Lifeways restructuring demonstrates, restructuring plans can enable care home operators to reduce rents to market rates, obtain a clean break from underperforming homes and right-size secured debt while preserving continuity of care.

The decision also provides helpful guidance on the use of RPs more widely, in particular by confirming that a RP will not fail solely because some class meetings are not attended. This further reinforces the utility of the RP as a restructuring tool that reflects commercial and economic realities.

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