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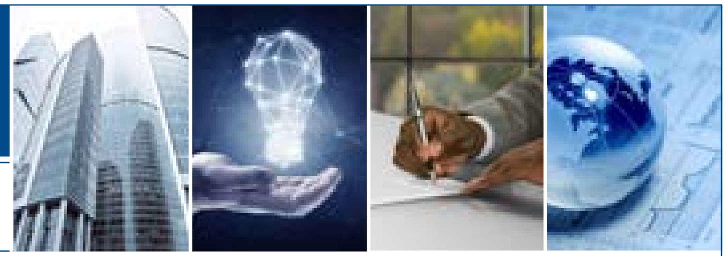

Financial Restructuring & Reorganization ADVISORY ■

JANUARY 19, 2022

Amicus Finance – The First Part 26A Restructuring Plan Sanctioned by the UK Court Despite Opposition from a Senior Creditor Class

by Phillip Taylor and Anna Nolan

The restructuring plan proposed by a UK short-term property lender, Amicus Finance Plc (in administration) is significant because:

- It is the first plan promoted by insolvency office holders (to rescue the company as a going concern).
- It is the first plan proposed by a small or medium-sized company.
- The court has crammed down a dissenting class of senior secured creditors for the first time.

On 15 November 2021, Justice Alastair Norris handed down written reasons for sanctioning the plan.

Background

Amicus has been in administration since December 2018. The administrators proposed the plan as they considered that there was insufficient cash available to continue to fund the administration. The plan was intended to return Amicus to solvency and rescue the company as a going concern. The administrators argued that the plan would provide Amicus's creditors with a better return than in a liquidation, which they considered to be the relevant alternative.

Key Elements of the Plan

- The injection of approximately £3.7 million in new funds.
- The making of certain lump sum payments to Amicus's expense creditors and preferential creditors in full satisfaction of their debts and to Amicus's secured and unsecured creditors in part satisfaction of their debts.
- A waterfall of payments from the proceeds of the legacy loans the company is entitled to from sanction of the plan until 31 December 2022.

The plan was approved by four of the five creditor classes:

Classes	Senior secured creditors	Junior secured creditors	Preferential creditors	Expense creditors	Unsecured creditors
Voted in favour?	No	Yes	Yes	Yes	Yes

The class of senior secured creditors included Crowdstacker Corporate Services Limited.

'No Worse Off' Test and the Standard of Proof

Crowdstacker challenged the plan and argued that Condition A (that none of the members of the dissenting class would be any worse off than they would be in the relevant alternative) would not be satisfied because it would be worse off in the plan than in the relevant alternative (an immediate liquidation). Crowdstacker argued that the 'no worse off' test was not met because Amicus's estimated outcome statement fundamentally undervalued recoveries in the immediate liquidation – a potential liquidator could pursue litigation of antecedent transactions, which would increase recoveries within liquidation. However, Crowdstacker did not suggest the source or amount of litigation funding or the terms on which such funding would be available. The court ultimately held that the administrators had successfully established that Crowdstacker was no worse off under the plan than it would be in the liquidation because, among other things, avoidance claims would require investigation and prosecution, with inevitable expense and delay (which compared unfavourably with returns under the plan).

In relation to the standard of proof, Crowdstacker argued that the administrators had to demonstrate that there was "no real prospect" of a better outcome under the relevant alternative. The administrators on the other hand argued that the relevant test should be based on the balance of probabilities. Section 901G(3) in Part 26A of the Companies Act 2006 specifies Condition A: that 'the court is *satisfied* (emphasis added) that, if the compromise or arrangement were to be sanctioned … none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative'.

The court concluded that the balance of probabilities is the correct test here.

Information That Needs to Be Included in the Explanatory Statement

Counsel for Crowdstacker relied on the Sunbird scheme of arrangement and argued that the explanatory statement was so 'sparse in detail about a prospective liquidation as not to present creditors with any "real alternative" to the scheme, to such an extent that it was not possible for creditors or the Court to undertake any comparison of potential outcomes'.

Justice Norris noted that the principle in Sunbird needs to be applied in different contexts. The Amicus plan was proposed by the administrators of a small or medium enterprise, who had provided detailed financial information to their creditors over a period of two years. Justice Norris noted that more specific information could have been provided in the explanatory statement, but 'the touchstone is not whether the fullest specific information reasonably obtainable was included in the Explanatory Statement: it is whether what was provided was *sufficient to enable the creditors to make an informed decision* (emphasis added) whether to accept the risks inherent in the scheme in place of the risks inherent in a liquidation'.

Justice Norris stated that 'an Explanatory Statement is meant to be a concise account of the facts material to the decision that has to be taken'.

The 'Fairness' Test

Justice Norris stated that creditors are the best judges of their own interests, but they may be expected to act rationally. He found that the Amicus plan was rational, and it was understandable why it was attractive to most creditors. The plan was proposed by administrators who must have regard to the interests of creditors as a whole (a significant feature). Under the plan, the expense and preferential creditors would be paid in full out of injected funds, and the unsecured creditors would receive something rather than nothing, also out of injected funds. The injected funds would be used to sustain trading operations so as to yield a fee income, to effect recovery of legacy loans where

Amicus has a beneficial interest, and to pursue professional negligence claims against Amicus's professional advisers. It was anticipated (though not guaranteed) that there would remain a sizeable distribution surplus for the senior secured creditors who otherwise stood to recover nothing. Justice Norris found that what underpinned the Amicus plan was the anticipation that recovery by a trading company would exceed recovery by a company in liquidation even if that meant the company going back to its shareholders and its directors.

Counsel for Crowdstacker submitted that the plan failed the 'fairness' test purely and simply because none of the benefits from future trading accrued to the compromised creditors; the benefits accrued solely to the Amicus shareholders. Justice Norris did not accept that submission and stated that it is not the role of the court to consider whether the scheme submitted for sanction is the best scheme or the only fair scheme or could be improved in some respect, but rather to assure itself that it is one approved by the requisite majority of properly informed and consulted creditors acting in accordance with their ordinary class interests and not oppressively in pursuit of some special interest (*Re Telewest Communications*).

Key Takeaways

- What ultimately matters is not the length of the explanatory statement, but that the information provided is sufficient to enable the creditors to make an informed decision about the plan.
- When the court is asked to exercise its power to cram down a dissenting class, the burden of proof lies with the plan proponent to satisfy the court that, *on the balance of probabilities*, no member of a dissenting class would be any worse off under the plan than it would be in the relevant alternative.
- Allegations regarding the conduct of the administrators will not influence the exercise of the court's discretion to sanction the plan, particularly if the proposed plan expressly preserves the right of a compromised creditor to pursue claims against the administrators under Paragraphs 74 and 75 of Schedule B1 of the Insolvency Act 1986.
- The court did not consider it material that returns under the plan were uncertain and noted that returns in the event of an immediate liquidation would be even more uncertain.
- The court will consider potential claims which the company or its insolvency officeholders may have against third parties and the impact of such claims in connection with the 'no worse off' test. Ultimately, the court's focus is on the eventual net recoveries which affect the return to creditors.

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