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English High Court Decision in Relation to Sanction of Fürst Part 26A Restructuring Plan

Article By:

John Houghton

Rupert Cheetham

Mollie O'Connor

Dr. Florian Rösch

Dr. Sara Berendsen

Jakob Methodius Jürgensen

On 4 March 2024, Mr Justice Richards of the English High Court delivered a judgment (the Judgment) in relation to the sanction of the restructuring plan under Part 26A of the Companies Act 2006 (the Plan) of Project Lietzenburger Straße HoldCo S.à r.l. (the Plan Company). The Judgment required that a new creditors' meeting of the Plan Company's senior creditors be convened to vote on an amended Plan. A further sanction hearing will be held on 7 March 2024, and it is assumed that the Court will proceed to sanction the Plan on the basis of the reasoning set out in the Judgment. Greenberg Traurig, LLP co-advised an ad hoc committee of senior creditors to the Plan Company (the Senior Creditors).

Key Takeaways

The Plan and the Judgment are significant for the following reasons:

- **Modification of the plan**: Following the Court of Appeal decision in *Adler* which was handed down before the Plan sanction hearing, the Plan needed to be amended to provide for some consideration to be received by those classes of creditors subjected to cross-class cram down (CCCD). This was so that the Plan could be considered a 'compromise or arrangement' as contemplated by Part 26A, notwithstanding that the out-of-the-money creditors would receive nothing in the 'relevant alternative' (being liquidation in the case of the Plan). Going forward, it is now clear that a 'compromise or arrangement' will generally preclude the confiscation or expropriation of rights for no compensation. The Court declined to follow the decision on this point in the Prezzo restructuring plan which was handed down last year (see our July 2023

GT Alert on *Prezzo*). Therefore, whilst declining to sanction the amended Plan, the Court displayed flexibility by permitting the Plan Company to convene a new Senior Creditors' meeting at short notice to vote on the amended Plan and allowed a new sanction hearing to be held the following week.

- **New money economics**: The Plan Company had significant short-term and medium-term liquidity requirements which could only be addressed by its existing creditors as there were no other viable sources of capital. Throughout the restructuring process, the Plan Company required emergency funding which needed to be provided voluntarily by the Senior Creditors on an unsecured basis. Given the high-risk nature of the new funding, the participating existing creditors will be compensated with additional economics including:

— entitlement to various fees which were benchmarked against market norms by the Plan Company's financial adviser; and

— the 'elevation' of a *pro rata* amount of their existing debt to a priority position in the post-restructuring waterfall. This elevation is subject to the rights of in-the-money creditors who did not participate in the new funding being 'no worse off' in relation to that waterfall.

It should be noted that these economics were not questioned by the Court (or, indeed, seriously challenged by opposing creditors at the sanction hearing for the Plan), demonstrating that companies proposing restructuring plans have the flexibility to propose creative post-implementation capital structures required by their stakeholders in a distressed or special situations scenario.

- **Appointment of new directors by the senior creditors via rights under the share pledge**: As an initial step in the Plan Company's restructuring, the Senior Creditors exercised voting rights pursuant to the security granted over the shares in the Plan Company and two of its affiliates. This enabled the appointment of independent directors to these entities, including Ryan Beckwith who eventually became the sole manager of the Plan Company.

- **Good forum shopping – 'COMI' shift**: Following their appointment, the new managers of the Plan Company received independent legal and financial advice and concluded that it was in the best interests of the Plan Company and its stakeholders to move its 'centre of main interests' (COMI) to England. The Plan Company could then utilise the English restructuring plan to avoid an insolvency, which is an outcome that was not available to it in other relevant jurisdictions. Opposing creditors vigorously challenged the Plan Company's efforts to move the COMI to England, but the Court accepted the substantial and robust evidence that a COMI shift by the Plan Company had occurred.

- **Fighting on all fronts - litigation risks for restructuring plans**: the Plan is yet another example of how Part 26A restructuring plans are becoming increasingly litigious where CCCD is employed to implement restructurings. The Plan Company and its affiliates have been subject to multiple liquidation proceedings in Luxembourg and the Plan itself has received significant creditor challenges in the English Court. Formal challenges to restructuring plans, which are supported by objecting creditors presenting their own evidence at the sanction hearing and instructing counsel to appear on their behalf, are now likely to be the norm rather than the exception.

Background

The Plan Company is a Luxembourg-incorporated entity and an intermediate holding company to Project Fürst, a large multipurpose property development at Ku'damm, Berlin with total secured debt exceeding €1 billion (the Development). The Plan Company is an existing guarantor of the debt related to the Development and, for the purposes of the Plan, it assumed obligations as a principal debtor pursuant to a deed of contribution.

Due to cost overruns, the Plan required a further €190 million of new super senior financing to fund the completion of the Development. This was in addition to c.€102 million which is currently frozen in an investment reserve account but will be released as part of the implementation of the Plan.

The Plan contemplates the restructuring of three tranches of existing German law-governed secured *schuldschein* loans and notes that matured on 28 November 2023:

- €775 million senior secured notes and loans issued to the Senior Creditors;
- €150 million senior tier 2 secured notes and loans issued to senior tier 2 creditors; and
- €95 million junior notes and loans issued to junior creditors.

The Development ran into financial difficulties in 2022, primarily due to material cost overruns. This resulted in the site being mothballed for over 12 months, with construction substantially halting in January 2023 before being brought to a complete stop in May 2023, despite the Development's projected completion of July 2023.

Forum shopping

A key area of challenge from one of the Plan Company's creditors was in relation to the Plan Company's COMI shift, arguing that either (i) the Plan Company had not shifted its COMI and therefore did not have a "*sufficient connection*" to the English jurisdiction; or (ii) if the Plan Company had shifted its COMI, it was an example of "*bad forum shopping*" and as such, the Court should not sanction the Plan.

During the summer of 2023, Senior Creditors instructed the trustee to exercise certain voting rights to alter the board composition of the Plan Company and two of its affiliates. The newly appointed independent managers then resolved to shift the COMI of the Plan Company in order to pursue the Plan.

The Plan Company successfully demonstrated that the COMI shift was sufficient to show a connection to the English jurisdiction because, amongst other factors, it would continue to have a permanent presence in England if the Plan was sanctioned, with the Plan Company having leased a premises in London and hired three full-time England-based employees. The Plan Company also argued the COMI shift was an example of good forum shopping as the shift had been done for the purpose of bringing the Plan Company within a jurisdiction that offered a restructuring solution that was for the benefit of creditors and would enable the completion of the Development.

In the Judgment, Richards J rebutted a challenging creditor's proposition that the Plan Company had only temporarily relocated to England, stating that "*the Plan Company's act of taking a 36-month lease of dedicated office space…provides a clear indication that it did not require office space on a temporary basis only*".

Relevant alternative

Another key area of challenge was in relation to the "relevant alternative", i.e. what was most likely to occur if the Plan was not sanctioned. The Plan Company's evidence demonstrated that if the Plan was not sanctioned, a liquidation of the Plan Company and Luxembourg insolvency proceedings of certain of its affiliates was the most likely relevant alternative to the Plan, following likely enforcement action by the Senior Creditors.

In the alternative, a particular out-of-the money creditor challenging the Plan argued it would be uncommercial for the Senior Creditors to take enforcement action if the Plan was not sanctioned. That creditor argued that the Senior Creditors would be motivated to find another restructuring solution and as such the most likely relevant alternative was a Luxembourg restructuring plan pursuant to a new Luxembourg restructuring law which came into effect on 1 November 2023 (Luxembourg Restructuring Law). The creditor had also proposed an alternative to the Plan which it argued was possible to implement pursuant to the Luxembourg Restructuring Law.

However, the Plan Company pursued a restructuring in England and not in Luxembourg:

- Firstly, because the Luxembourg Restructuring Law only came into effect in November 2023, whereas the Plan was launched in October and the Plan Company had initially hoped that the Plan would be sanctioned and become effective in early December 2023.

- Secondly, the Luxembourg Restructuring Law was completely untested compared to a Part 26A restructuring plan.

- Thirdly, the Luxembourg Restructuring Law requires unanimous consent from all secured creditors that would have their rights substantially impacted and was therefore vulnerable to holdout creditors.

Given the above, the Court ultimately agreed with the Plan Company's position in relation to the relevant alternative.

Consideration for out of the money creditors

The Plan that was initially proposed by the Plan Company relied on the judgment of Mr Justice Smith in *Prezzo* in respect of its treatment of subordinated "out of the money" creditors. In *Prezzo*, the Court held that when determining whether Condition B under section 901A(3) of the Companies Act 2006 is satisfied, the term "compromise or arrangement" in the context of a Part 26A restructuring plan does not necessarily require any form of consideration to be provided to out-of-the-money creditors.

The original Plan voted on by creditors in November 2023 provided that, given the out-of-the-money creditors would receive nothing in the liquidation of the Plan Company (being the relevant alternative to the plan), those "out of the money" creditors should, similarly, receive nil consideration under the Plan for a complete release of their claims.

Plan modification

However, following the successful *Adler* appeal, the Plan Company sought to amend the terms of the Plan due to certain remarks made by Snowden LJ in the *Adler* judgment (by way of a "provisional view" as this was not a direct point in question in *Adler*) in relation to *Prezzo*. In his judgment, Snowden LJ indicated there must be some "*give and take*" for the Plan to be considered an arrangement with its creditors including out-of-the-money creditors.

Whilst it had not been strictly necessary for the Court of Appeal to decide this point in relation to *Adler*, it was Snowden LJ's "provisional" view that a Part 26A restructuring plan requires some form of consideration to be provided to "out of the money" creditors. Therefore, the Plan Company, relying on the power to make modifications under the Plan, sought to amend its terms such that an aggregate amount of €200,000 would be made available to make *ex gratia* pro-rata payments to out-of-the-money creditors.

In order to avoid the Plan failing on a technical argument that there was no 'compromise or arrangement' with its out-of-the-money creditors, the Plan Company invited the Court to make orders that a further plan meeting of the Senior Creditors be held on short notice. This took place on 1 March 2024, and the overwhelming majority of the Senior Creditors voted in favour of the modification.

The Court also held that further meetings of the out-of-the money creditors were not required as they had no genuine economic interest in the Plan Company in the relevant alternative. This is possible under section 901C(4) of the Companies Act, which was used for the first time in the second restructuring plan of *Smile Telecoms*, in respect of which Greenberg Traurig advised the super senior creditors.

Lessons learnt

- Companies should be wary of presenting a Part 26A restructuring plan that offers no compensation or "give and take" to out-of-the-money creditors in exchange for a complete release of their claims. However, the amount of compensation to such creditors can be relatively modest compared to the quantum of claims being compromised, and in the case of the Plan it involved a €150,000 payment for the senior tier 2 creditors and a €50,000 payment for the junior creditors, in order to compromise an aggregate amount of of c.€245 million of out-of-the-money claims.

- Shifting the COMI of a plan company should be satisfactory to show a sufficient connection to the English jurisdiction, and a COMI shift will not necessarily constitute "*bad forum shopping*" if the plan company can show the shift was done in order to promote the best solution for stakeholders and the plan company.

- It continues to be the view of the Court that little weight should be ascribed to the views of an out-of-the-money class of creditors when determining how the benefits of a plan are distributed (i.e. the 'restructuring surplus'), in particular when a creditor is "so far out of the money". In this case, the Senior Creditors consented to nominal consideration being received by parties related to the ultimate beneficial owners of the Plan Company, which is not prohibited (unlike in other jurisdictions) as there is no 'absolute priority' requirement in restructuring plans.

- Foreign companies wishing to propose a Part 26A restructuring plan need to be wise to the threat of litigation in jurisdictions outside of the United Kingdom which may be used by disgruntled creditors in an attempt to create a “blot” on the plan. However, Fürst shows that such actions can be successfully fought in parallel with the Plan proceedings.

- Part 26A restructuring plans are becoming increasingly adversarial. Companies must be prepared for their expert and witness evidence to be heavily scrutinized under cross-examination. As such, having strong evidence as to valuation and the what the “relevant alternative” would be is essential.

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