Restructuring plans: magic bullet or unaffordable luxury?

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The restructuring plan, based upon the Part 26 Companies Act 2006 Scheme of Arrangement, is both a relatively new procedure and one of the most powerful weapons in the armoury of the restructuring professional. Since 2020, it has allowed a company that is in or likely to encounter financial difficulties to put to its creditors a compromise or arrangement. The purpose of that compromise or arrangement must be to eliminate, reduce, prevent or mitigate the effect of those financial difficulties. So long as the compromise is approved by at least one class of creditor with a genuine economic interest in the “relevant alternative”, the court can impose it on other classes of creditor. Classes of creditor on whom a restructuring plan *is* imposed must be no worse off under it than under the “relevant alternative”.

The “relevant alternative” is whatever the court considers most likely to occur if the plan is not sanctioned. That will be a question of fact. In some cases, the alternative may be administration. In others, it could be liquidation.

Over the past two years, the restructuring plan has been used to exclude creditors with no economic interest in a company *(Re Smile Telecoms* [2022] EWHC 387 (Ch). It has been employed to impose agreed compromises on landlords and financial creditors alike. The restructuring plan has also been used as an exit from administration – *Amicus Finance* [2021 EWHC 3036 (Ch). It is therefore a flexible and powerful tool.

That flexibility comes with material “front ended” preparation and cost. There will be two court hearings – the first to call meetings of the classes of creditor to whom the plan is to apply. Assuming a majority of 75% in value of at least one class of creditor – above – approves the plan, the court will be asked at a second hearing to approve (sanction) it.

Hence, the process may not come cheaply. In its interim report into the Corporate Insolvency and Governance Act 2020 (“CIGA 2020”) (“IS Report”) published on 21 June 2022, the Insolvency Service recognised the restructuring plan as a “fantastic initiative” that is “particularly useful”. However, the IS goes on to recognise that the inherent cost of the restructuring plan can be problematic. It refers to the costs of a straightforward SME restructuring plan as being between £100,000 and £150,000. In larger cases, such as Virgin Active or Smile Telecoms, the costs incurred have been six figure numbers. To some extent, the higher costs follow from the need to go to court and to produce robust valuation evidence in support of the “relevant alternative”.

However, restructuring plans can also, with careful planning, be available to smaller companies needing, as a restructuring negotiation unfolds, a robust means of imposing a settlement on dissenting creditors. The IS Report identifies a number of alternative ways of managing the process, such as opening the jurisdiction up to ICC judges and removing the “financial difficulty” requirement. Finding the necessary parliamentary time to make changes to the legislation is likely to be challenging.

We are unconvinced that legislative amendment is really necessary. We consider that the way forward can lie within the legal and financial advisor community. First, the more familiar advisors become with the restructuring plan process, the more efficient they should become in using it. Secondly, the courts could assist by encouraging plan proponents in simpler cases to keep their evidence clear and concise. Robust project management will be essential. Experience shows that “smaller” cases can on occasion raise as many challenges and difficulties – if not more – than larger ones. If there is a fundamental dispute between creditors, extensive valuation support and some level of litigation may be unavoidable. Hotly disputed cases are unlikely to be suitable for restructuring plans, irrespective of their size.

The best way forward is thus likely to be the use of tightly drawn assumptions – e.g.:

- Clear identification from the outset of the classes of creditor to whom the plan should apply;
- Assume (downwards) the number of drafts of each document being produced – e.g. an initial draft of restructuring plan, explanatory statement and court documentation together with one or two rounds of negotiation before the production of a final draft.
- Identify at the outset whether recognition proceedings will be needed – and when – in other jurisdictions. The nature of those proceedings will ultimately depend upon the terms of the restructuring plan. Hence consider excluding such proceedings from the initial scoping and quote for them separately once the basis of the plan has been determined.

- Last but not least, make any estimate time bound e.g. 3 to 4 months from start to finish.

It would be unrealistic to describe the restructuring plan as a "magic bullet". The process is too flexible and fact based to justify such a conclusion. However, the fundamentals are the same irrespective of the size of any given case. The development of a restructuring plan is a team project in which all of the company, its legal and financial advisors have their roles to play. Clearly, assigning responsibilities between the parties is a sound starting point irrespective of the size of the business concerned. Combine that with transparent communication, clear assumptions and measurable targets and the flexibility of the restructuring plan could become more widely available as against ending up as the unaffordable luxury that some already perceive it to be.

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