VIRGIN TERRITORY FOR PART 26A RESTRUCTURING PLANS

1 Apr, 2021

Mr Justice Snowden has handed down judgment following the convening hearing in what are probably the most contentious schemes under Part 26A of the Companies Act 2006 to date.

The interconnected Restructuring Plans were proposed by three Plan Companies, namely Virgin Active Holdings Limited, Virgin Active Limited, and Virgin Active Health Clubs Limited. The evidence of the Plan Companies suggested that, if the Plans were not to be implemented during the week commencing 10 May 2021, the companies would be forced into administration.

Notice of the convening hearing and the Practice Statement Letter had been circulated only on 10 March 2021. The Explanatory Statement and other documents had variously not been provided to Plan Creditors, or had been circulated to them only the day before the convening hearing was due to commence (on 25 March 2021).

At the risk of oversimplification, the order sought by the Plan Companies was that the court should convene a total of 21 meetings, to enable the classes of creditors to vote on the Plans. The creditors fell into three broad categories:

1. The Secured Creditors, who had been involved in negotiations from the outset.
2. The Landlords, who were sub-divided into Classes A–E, according to the profitability of their Leases.
3. The General Property Creditors, who included sub-tenants of certain of the Class E Leases.

Some creditors were excluded from the Plan altogether, because the Plan Companies intended to pay their debts in full. They included trade creditors and employees.

It was against that background that complaints were raised by four distinct groups. The objections raised by the Plan Creditors traversed a significant range of issues, the key points of which are as follows:

1. An ad hoc group of landlord creditors submitted that insufficient information had been provided to enable the landlords to vote on the Plans. The further submission was made that simply being able to raise issues as to class composition and information that might impugn the Plans at the sanction hearing were not to be considered a "panacea" at the convening stage.
   The ad hoc group further submitted that the 'relevant alternative' (critical for the court's exercise of its 'cram down' powers under CA 2006, s. 901G) had been presented by the Plan Companies as a fait accompli, there was good reason to doubt it and that the Plan Creditors were being required to take much on trust. The essential point was that the shareholders' interests were likely to experience a significant upside after the effects of Covid-19 had passed, whereas many creditors (with the exception of the Secured Lenders) were being made to bear a disproportionate burden on the plan. The result was that the ad hoc group said the convening order should not be made, and further disclosure was required before the meetings could take place.
2. A Class B Landlord (Riverside Crem 3 Ltd) submitted that there was insufficient material available to creditors to enable them to understand (and therefore challenge) the class composition and, in particular, why that Landlord had been placed in Class B rather than Class A. Many of the criticisms raised by the ad hoc group were echoed.
3. The Manager appointed by the First-Tier Tribunal to manage the Canary Riverside complex raised a specific point in relation to the residential tenants of some 325 units in a mixed use estate. The result of the Plans would appear to have required the Manager to recharge certain service charges to those residential tenants, with no recourse against the Plan Companies beyond a right to receive a payment.
4. Pure Gym Limited is a sub-tenant of certain of the Class E Leases. Pure Gym's objections to the Plans, as first set out in the Practice Statement Letter, were that (i) the intention of the Plans seemed to be to terminate the sub-leases altogether, (ii) it was not clear why certain Class E sub-leases had been included, but not others, and (iii) it was not clear to what extent Pure Gym's rights against the Plan Companies would be compromised under the Plans.

While noting the significant time pressures that all parties were under, and the lack of notice and information that had been provided to the Plan Creditors, Mr Justice Snowden made the convening order. The order has however been made without prejudice to points that may yet be raised. The sanction hearing has been listed for 3 or 4 days (assuming the Plans are approved by the requisite majority).

If the points canvassed at the convening hearing are any indication of what is to come, any decision arising from the sanction hearing is likely be the seminal case on many issues, including the court's use of the Chapter 11-inspired 'cross class cram down' procedure, the methodology for measuring the 'relevant alternative', and the methods and formulation of class composition.

The legal consequences are likely to be significant. The commercial ramifications of the Plans being sanctioned are immense.

Simon Passfield and Samuel Parsons, instructed by Browne Jacobson LLP, acted for Pure Gym Limited, who sought clarification as to the intended impact of the Restructuring Plans on their rights as sub-tenants in light of the inconsistencies and ambiguities in the Practice Statement Letter. As a result of their representations, the Plan Companies agreed to make significant modifications to the Plans.