Akin

Restructuring Watch

March 2023

In this edition of Restructuring Watch, we cover several significant developments in the world of corporate restructuring and insolvency. We examine the effective operation of the special resolution regime in relation to Silicon Valley Bank, draw out key takeaways from numerous recent restructuring plans, and discuss the most recent government report on the permanent reforms introduced by the Corporate Insolvency and Governance Act 2020. We also explore a recent judgment in the Sova Capital special administration and take a deep dive into the long-awaited *Sequana* judgment.

We would be very happy to discuss any aspect of the below with you.

Smooth use of the SRR

Friday 10 March 2023 saw Californian regulators step in to close Silicon Valley Bank (**SVB**), appointing the US Federal Deposit Insurance Corporation to act as receiver, Swiftly thereafter, the Bank of England (**BoE**) announced that, absent meaningful further information, it would apply to the English Court to put Silicon Valley Bank UK Limited (**SVBUK**), SVB's UK subsidiary, into a Bank Insolvency Procedure.

On Monday 13 March 2023, however, news emerged that the BoE had taken the decision to sell SVBUK to HSBC UK Bank Plc. The transfer was effected by the BoE exercising one of its stabilisation powers under the special resolution regime (established by the Banking Act 2009) which permits the BoE to transfer all or part of a bank's business to an appropriately authorised private sector purchaser without the need for consent from the transferring bank, shareholders, customers or counterparties. In taking that action, the BoE was focused on "*ensuring the continuity of banking services, minimising disruption to the UK technology sector and supporting confidence in the financial system*". With the BoE and the Treasury confirming that following the transfer, depositors' money is secure, and services would continue to operate as normal, the SVB case is a clear demonstration that the special resolution regime can operate efficiently and effectively. This weekend also saw the Swiss regulators take proactive action in relation to Credit Suisse.

Restructuring Plans on The Rise

Since it was introduced in the summer of 2020, a number of companies have used the UK restructuring plan to implement restructurings, and it is now an established and viable process. The beginning of 2023 has already seen multiple plans proposed, each adding in unique and individual ways to our understanding of this (now not so new!) process.

- **A solution for SMEs?** In August 2021, the Court sanctioned the first restructuring plan proposed by the administrators of an SME, Amicus Finance plc. Since then, a number of other plans proposed by or in relation to SMEs have been sanctioned: the Houst Limited plan in the summer of 2022, the plan proposed in relation to The Good Box Co Labs Limited (in administration) (**GoodBox**) in January and as of today, meetings have been convened to vote on plans proposed by two further SMEs, The Great Annual Savings Company Ltd (**GAS**) and Nasmyth Group Limited (**Nasmyth**). While the plan legislation does not limit the types or size of companies that can use restructuring plans (the only threshold criteria are that the company be experiencing financial difficulties and the plan must seek to address or mitigate those difficulties), concern has previously been expressed that the cost of the process may deter smaller companies from proposing restructuring plans. With these recent examples demonstrating that the restructuring plan is a realistic option for SMEs and, as we consider more fully below, clear government focus on improving SME access to restructuring plans, we expect to see more as the year unfolds.

- **First creditor-proposed restructuring plan:** The GoodBox restructuring plan was the first to be sanctioned by a regional (rather than London) Court, but that is not the only reason to take note of it. It was also the first (and currently, only) restructuring plan proposed by a creditor of a company, rather than the company itself or (as was the case in relation to Amicus Finance) its administrators. It is uncommon for creditors to propose schemes of arrangement in light of the requirement in *Re Savoy Hotel Limited* [1981] that the company (via its directors or shareholders or, if relevant, an insolvency officeholder) must consent to the scheme. In sanctioning the GoodBox plan, the Court did not deviate from, or seek to overturn, the *Re Savoy* principle: the company's consent to a scheme or restructuring plan remains a requirement. The judge directed GoodBox's Administrators to provide the relevant consent on behalf of the company and, once they had consented in accordance with his direction, the plan was sanctioned. This case can, however, be distinguished from most other situations on its facts, and we do not expect it to herald an era of creditor-proposed schemes and restructuring plans. First, the proposing creditors had significant information about the company as a result of prior detailed engagement, whereas ordinarily information for creditors is necessarily limited, particularly outside of administration, such that creditors will usually find themselves without sufficient information to propose a plan. Also, while the Administrators could be directed to consent in this case, the Court has no equivalent power where no insolvency officeholder has been appointed and a creditor-proposed plan outside of an insolvency proceeding will necessarily rely on the active support and cooperation of the company (which may not be forthcoming).

- **What about out-of-the-money stakeholders?** A consistent theme in the restructuring plan cases to date is that (to use the words of the judge sanctioning the Virgin Active restructuring plan in May 2021) "little or no weight" should be placed on the votes or positions of out-of-the money creditors. That point was re-emphasised (and confirmed) recently by the judge sanctioning seven (mostly) interconditional plans proposed by the Lifeways group of companies. In a judgment handed down on 3 March 2023, the judge placed no weight on the fact that turnout at one of the unsecured creditor meetings was only c.8% of relevant creditors. He took the view that because those creditors were out-of-the money, *"non-attendance is most likely explained by an understandable lack of engagement"*.

- **HMRC: crammed down once, challenge it twice?** As reported in this edition of Restructuring Watch, the Houst restructuring plan was the first to cram down HMRC as a secondary preferential creditor. While HMRC voted against the Houst plan, it did not appear before the Court at either the convening or the sanction hearings to challenge it. That approach appears to be changing. The tax authority reportedly appeared via counsel at the convening hearings for both the GAS and Nasmyth restructuring plans.

Reflecting on the CIGA Reforms

Last summer, the Insolvency Service published an interim report on how the permanent measures introduced by the Corporate Insolvency and Governance Act (**CIGA**) in 2020 – being the restructuring plan, moratorium and the restriction on contractual termination provisions upon insolvency (*ipso facto* clauses) - have been received. For more detail on that interim report, see this edition of Restructuring Watch.

In December, and based on feedback from interviews with restructuring professionals and an online survey of insolvency practitioners, the final evaluation report was published by the Insolvency Service. Taking each of the permanent reforms in turn:

- **Restructuring plan:** The general consensus is that the restructuring plan is operating well, and is seen as a positive addition to the toolbox. There remains concern about SME uptake of the process and the report includes a number of suggestions to increase SME engagement, including, for smaller and uncomplicated cases, a single sanction hearing or a convening hearing on paper and/or using an Insolvency and Companies Court judge instead of a High Court judge. This report was released prior to the GoodBox, GAS and Nasmyth plans coming before the Courts and while there is no suggestion in the report that these modifications will be introduced with haste, if they are, the anticipated increase in SME restructuring plans may be even more pronounced.

- **Moratorium:** The response to the moratorium was less positive, primarily due to its limited use to date. Key areas of concern include the capital markets eligibility exemption, which restricts companies with debt issuances of GBP 10 million or more from using the process and the fact that even if the process is available, there is no payment holiday from amounts due under financial contracts.
- ***Ipso facto* clauses**: As in the interim report, this reform has been positively received, although the conclusion drawn was that it was too early to determine the effectiveness of this measure (given the period through which pandemic-related government support continued).

There will be a final Post-Implementation Review published in June 2023 (as required by CIGA).

Sova Capital Sale

On 2 March 2023, the Court handed down judgment approving the sale of a number of securities to an unsecured creditor of Sova Capital Limited (in special administration) in return for a waiver of that creditor's claim against the company. Due to sanctions imposed by the UK, the US and the EU, and Russian countermeasures, the joint special administrators (the **JSAs**) were constrained in the ways in which they could realise or sell the securities. From a sanctions perspective, while the Court stated that there was no realistic risk that the sale would infringe EU, US or UK sanctions, consent was required (and obtained) from the Government Commission for Control of Foreign Investment in the Russian Federation. The case also brought a number of interesting and technical issues before the Court, including:

- **Administrators' discretion:** The JSAs sought the Court's approval for the sale of the securities, which was challenged by a competing bidder on a number of bases, including that in seeking the Court's approval of the sale, the JSAs were surrendering their discretion to the Court. The judge disagreed, highlighting that the JSAs had already decided to execute the transaction, and were seeking Court approval to make that effective, rather than leaving the decision to enter into the transaction to the Court. He emphasised that the exercise of an administrator's powers is a matter of commercial judgment for the administrator, and is not an appropriate matter for the Court to direct. But it is well established that officeholders may seek the Court's approval of certain transactions, particularly where what is proposed is "particularly momentous", and in this case he considered it correct and appropriate that the JSAs seek the Court's approval given that, among other things, the disposal was to be of a substantial part of the estate and the "legal mechanism" by which the disposal was to be effected (transfer plus waiver of unsecured claim) was novel.

- **The power of sale and the pari passu principle**: The Court considered that an administrator's power to sell or otherwise dispose of property is broad enough to cover a transaction where a creditor waives its claim against the company. The power of sale is always constrained by the requirements that the sale be for a proper price and that the administrator is under a duty to take reasonable care to obtain the best price in the circumstances. In response to a challenge made by the competing bidder – that the transaction as structured was not consistent with the pari passu principle – the judge was clear that the principle applies to distributions, not sales – and what was taking place in this case was a sale.

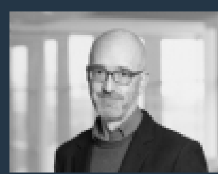
Sequana: Priorities in the Twilight Zone

In October, and after a wait of almost 18 months, the UK Supreme Court handed down its judgment in *BTI 2014 LLC (Appellant) v Sequana SA and Others (Respondents)*. For the first time, the UK's highest court considered the existence, content and engagement of an obligation on directors to take into account the interests of creditors when a company becomes, or is on the cusp of becoming, insolvent (otherwise known as the "creditor duty").

In its long-awaited judgment, the Supreme Court held that when directors know, or ought to know, that a company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable, their duty to consider the interests of creditors is triggered. For our detailed thoughts on this case, please see our alert here.

Questions?

If you have any questions, please contact:



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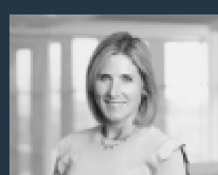

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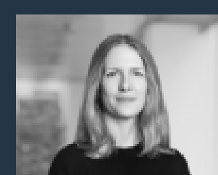

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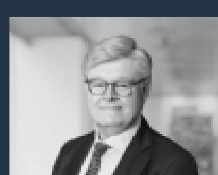

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