

# Restructuring Plans and Real Estate

An update on the restructuring plan and a look at how real estate may be the topic of the next round of distress

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Freshfields Bruckhaus Deringer

# Agenda

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## Restructuring Plans

- Key lessons from the first 3 years of Restructuring Plans.
- Opportunities and pitfalls, including Restructuring Plans for SMEs, what you need to know, and how Restructuring Plans might develop.

## Real Estate

- The Real Estate sector has been much discussed but is 'the dog that (largely) hasn't barked'?
- Is a Real Estate wave really coming, or is this again just market chatter?

# Restructuring Plans





# The toolbox



# Restructuring plans

## The basics

### The framework

Compromise between company and its **creditors and/or members**.

Company encountering/likely to encounter **financial difficulties**.

Available for **non-UK companies** if '**sufficient connection**', but need to check local recognition.

Sanction always a matter of the court's discretion.

**Same procedure as schemes** of arrangement – two court hearings, formal, public, document heavy.

Creditors and shareholders divided into classes with **similar rights** and interests.

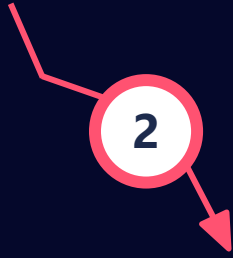
A class approves by **75 per cent in value** of those voting in that class (no headcount or connected person test).

No moratorium.

Exclude: Classes with **no genuine economic interest** can be **excluded** from the vote but still bound by the plan.

**Cross-class cram down:** Classes who vote against can be bound, so long as they are **no worse off** than in the **relevant alternative** and approving class(es) have a **genuine economic interest** in the company.

No DIP financing provisions (although can be achieved inside the plan). Third party releases possible.



**Some stats...**



# Overview of restructuring plans to date

## Some statistics

There have been:

**23**

Sanctioned restructuring plans sanctioned since their introduction

**3**

plans were not sanctioned

**15**

utilised cross class cram down

**6**

were in the SME space

**6**

used it for landlords (as well as financial debt)

**1**

plan was withdrawn

**13**

were English companies with their 'natural COMI' in England,

**6**

created the sufficient connection with England

**4**

crammed down (or attempted to cram down) HMRC

# Use of the restructuring plan

What we have seen so far...





# What has the restructuring plan been used to achieve?

## Debt write off



**HOUST**



**DEEPOCEAN**

*Clintons*

## Debt for equity swaps



*Clintons*

## Debt Amendment



## Super Senior New Money



# What has the restructuring plan been used to achieve?

Rent reduction and rent portfolio adjustment



PREZZO

Clintons

Amend Equity Documents



Compromise of HMRC



PREZZO

Parallel process – deal with Gibbs



# The restructuring plan for mid-market

## A story of two halves

### What is working well

- Track record of use of the restructuring plan for mid market to SMEs developing
- Judiciary keen to help companies make it work and be flexible on document load

**HOUST**

PREZZO

**lifeways**  
group

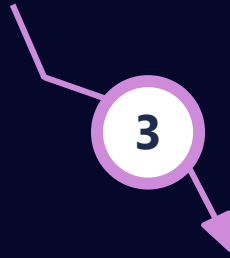
**GREAT**  
ANNUAL SAVINGS  
GROUP

*Clintons*

**F** *Fitness First*

### What is not working well

- Costs of an RP are still significantly higher than costs of other processes
- In the mid-market the costs are estimated to be between £1m and £2m
- CIGA review highlights considerations that for a SME RP which is not complex or contentious having to have two applications to court and two full hearings may be inappropriate
  - Costs of challenge can be high



# Key takeaways on restructuring plans

From recent practice and court judgments

# Key practical lessons

1

## Valuation and reports

No absolute obligation to market test and not always more reliable.

The mere existence of a broad range in the valuation does not make it unreliable.

Expect to disclose fulsome valuation– but proprietary information can be withheld.

Author of the reports should be prepared to be cross–examined.

Challengers are encouraged to adduce their own evidence and engage with court process.

*(Virgin Active, DeepOcean, Smile, Adler, Great Annual Savings, Prezzo)*

2

## Litigation lens

Expect actions leading up to the restructuring plan to be played back in court later.

Company needs to be a neutral player or may face criticism.

Expert evidence must comply with Part 35 of the Civil Procedure Rules.

Any party opposing a plan will need to need to fully engage with the court process.

*(Virgin Active, National Car Parks, Hurricane Energy, Smile, Houst, Adler)*

3

## Disclosure

Notice to go earlier and contain more details.

Company must co-operate in timely provision of information.

May need to put in place processes to allow disclosure of commercially sensitive information.

Creditors can use normal litigation procedures to seek additional disclosure.

*(New Practice Direction, ColourOz, Codere, Port Finance, Virgin Active)*

4

## 'No worse off'

Court decides what is the relevant alternative now on the balance of probabilities – not what other proposals could have been made.

'Most likely', not definitely or more likely than not.

'Court taking pragmatic view – 'near miss' point, acknowledging it cannot predict the future but reluctance to push company into insolvency.

Court looks to actual sums owed to creditor, ie principal amount not interest.

*(DeepOcean, Gate Group, Virgin Active, Hurricane Energy, Amicus Finance, Houst, Adler, Great Annual Savings)*

5

## Equity retention

Existing shareholders retaining a portion of the equity is possible.

Often combined with an injection of new money.

Where no new money is injected by shareholders great caution is required.

*(Amicus Finance, Virgin Active, Adler, Nasmyth, Great Annual Savings, Prezzo)*

# Key practical lessons

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## Horizontal comparison

Where cross-class cram down is used, Court may consider if there is a fair allocation of the 'restructuring surplus'.

No absolute priority rule.

Court will normally approve a plan if there is equal treatment between all creditors which normally means adherence to the *pari passu* principle.

But Court can approve a plan treating individual creditors or classes of creditors differently if there is a *good reason* or a *proper basis* for departing from the *pari passu* principle and for the differential treatment.

In-the-money creditors can decide how to divide the restructuring surplus (within reason).

*(DeepOcean, Virgin Active, Houst, Adler, Nasmyth, Prezzo)*

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## 'Financial difficulties'

No detailed guidance, but a fairly low bar.

Administration alone will not satisfy the requirement.

'Financial difficulties' can be self-created.

Court taking broad view on how the plan proposes to deal with 'financial difficulties'.

*(PizzaExpress, DeepOcean, Gate Group, Amicus Finance)*

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## Burning platform

Court critical when restructuring plan left to last minute ('gun to court's head').

But without the urgency of immediate distress:

court may expect a more generous timetable, with greater opportunity for scrutiny/challenge;

there could be a higher hurdle to demonstrating the 'no worse off' test for the purpose of cross-class cram-down.

*(Virgin Active, National Car Parks, Hurricane Energy)*

9

## Structuring

Use of deed poll/contribution deed in order for guarantor (eg a newco) to propose scheme/RP.

Approved, despite clear artificiality, in a number of cases- though not without reservations.

*(Swissport, PizzaExpress, Gate Group, Port Finance, ED&F Man, SGB-SMIT GmbH, Prezzo)*

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## No 'gerrymandering'

Warning shot about not including fully consented classes so as to use cross-class cramdown.

BUT sometimes the court is prepared to sanction with 100 per cent consent.

Court will look ever closer at schemes/RP 'in the round', and consider the full 'package' of rights (even if ancillary).

*(Virgin Atlantic, Malaysia Airlines, Codere, Port Finance, Selecta, ColourOz, Houst)*

# Key practical lessons

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## Excluded creditors and members

Court focuses on reasons for exclusion and must be satisfied that none of the members of the class has a genuine economic interest in the company.

Those affected should be given ample notice and the opportunity to object.

*(Deep Ocean, Virgin Active, Smile, Great Annual Savings)*

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## Compromise

The concept of an 'arrangement' does not require some form of consideration to be provided to "out of the money" creditors.

*(Smile, Great Annual Savings, Prezzo)*

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## Discretionary factors

Dissenting votes of out-of-the-money creditors should not weigh heavily or at all in the sanction decision.

That is especially so if there is no evidence on *why* they dissented.

Court will take into account the overall level of creditor consensus as relevant but not decisive.

Court will look at how the restructuring surplus is shared.

*(Deep Ocean, Virgin Active, Smile, Houst, Adler, Nasmyth, Great Annual Savings, SGB-SMIT GmbH, Prezzo)*

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## HMRC

There is no principle that requires a company to pay HMRC's preferential debt during the plan process in order for the court to sanction a plan.

HMRC is different as it is an involuntary creditor and the court will exercise need for caution in considering the 'cram-down' of HMRC debts – but in principle HMRC can be crammed down.

*(Nasmyth, Great Annual Savings, Prezzo)*

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## Critical creditors

Good commercial reasons should be shown in detailed valuation evidence (eg de minimis, or dealt with bilaterally etc).

Court should generally accept the reasons given by the Company unless it is plain and obvious that the creditors are not essential to the future operation of the plan company or the Company's reasons do not make sense or there is evidence to the contrary.

*(Virgin Active, Houst, Nasmyth, Prezzo)*



# Real Estate





# What is the chatter?

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1

**Commercial property values  
have crashed**

2

**Focus on loan maturities as sponsors will not be able to borrow  
enough to refinance all of the maturing debt**

# What are the facts?

Values have crashed

## All European commercial property

Peak Q2 '22 to now:

**-21%**

vs

GFC peak to trough:

**-18%**

## Adjusting for inflation

Current crash:

**-28%**

vs

GFC:

**-23%**

# What are the facts?

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Focus on loan maturities

**£60bn UK Senior CRE loans maturing 2023-2025**

*20% non-bank lenders*

**Europe?**

# Loan to Value

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For loans written 2018/19

Retail  
**100%**  
LTV

Office  
**80%**  
LTV

Industrial  
**50%**  
LTV (But ICR is  
a problem)

# What does this mean?

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Amend  
& Extend

Equity  
injection

Forced  
Sale

Capital  
Solutions

Enforcement  
& sale

Loan sales  
(followed by  
enforcement?)

Restructuring?

# Opportunities

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1

**P2Ps**

2

**Provide capital  
solutions**

3

**Distressed  
investing**

4

**Restructurings**

# Contacts

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# Q&A







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