English Court Declines to Sanction Amigo's Scheme of Arrangement, Following Opposition from the Financial Conduct Authority

27 May 2021

At a Glance

On Tuesday, May 25, the English court handed down a judgment declining to sanction the scheme of arrangement of a company within the Amigo Loans group, following opposition from the UK Financial Conduct Authority ("FCA"). It is very rare for the court to decline to sanction a scheme.

The key takeaways from the court's decision are:

1. **Alternative to scheme:** the court did not believe an imminent insolvency filing was the true alternative to the scheme; the directors should instead assess alternative restructuring proposals
2. **Rationale for restructuring terms:** the court criticised the lack of disclosure relating to the rationale for the restructuring terms proposed; in particular, the company had not provided adequate reasons for saying it would not be possible to engage with shareholders in a broader restructuring
3. **Disclosure:** the scheme explanatory statement was insufficient to inform scheme creditors about the scheme and the realistic alternatives to it, in presenting a binary choice to scheme creditors and not explaining the basis on which shareholders were to retain their full equity interest (while the scheme creditors — consumer redress claimants — were taking a 90% haircut)

Key terms of the scheme

Company	ALL Scheme Ltd — a special purpose vehicle within the Amigo Loans group incorporated to promote the scheme. The Amigo Loans group is a provider of “guarantor loans”, offering credit to consumers unable to borrow from mainstream lenders
Proposal Date	25 January 2021 (practice statement letter posted on scheme website)
Approval	c. 95% in both number and value, of those voting — though turnout comparatively low, at c. 9-10% by number and value
Terms	• Broadly, the purpose of the scheme was to provide a mechanism, including a bar date, for the determination of the claims of scheme creditors (comprising customers with possible redress claims and the Financial Ombudsman Service for outstanding case handling fees) and to set up an earmarked fund to be used to pay part of their claims • The scheme fund would consist of an initial £15 million contribution plus a “balance adjustment contribution” of up to £20 million (following calculation of adjustments to customers’ outstanding balances pursuant to valid claims by way of set-off) and a “future business contribution” of 15% of annual pre-tax profits for the next four years • The scheme creditors would in turn release their claims against the group • Single class of unsecured scheme creditors • The company’s parent is listed on the LSE; critically, the scheme involved the shareholders retaining their economic interest in the group

Court’s rulings

Alternative to the scheme

The evidence adduced by the company failed to persuade the court that the most likely alternative to the scheme was an imminent collapse into insolvency; there was nothing in the evidence to suggest any imminent insolvency or any immediate (or even medium-term) liquidity crunch.

The court was not persuaded that, if the present scheme failed, there would be no room for further proposals to be formulated to preserve value for stakeholders. That view was supported by the substantial increase in the market capitalisation of the group since the scheme proposal was announced.

Rather, there were various reasons to suppose the directors would have a reasonable period of time in which to assess and promote further restructuring proposals, and that they would in fact do so. In particular, the FCA had indicated it would agree to the continuation of an existing informal moratorium on payment of consumer redress claimants, if the group wished to consider and promote another restructuring scheme or plan.

The court noted the market's perception that there was substantial surplus value in the enterprise and therefore considered it improbable that directors of an FCA-regulated listed group would simply force the group into insolvency without carefully assessing revised restructuring proposals. The court emphasised the directors' statutory and fiduciary duties to promote the business of the group companies and to take account of the interests of the various stakeholders.

The court did not accept the company's suggestion that it would take as long as six months, and up to £15 million, to negotiate further restructuring proposals.

Disclosure and Fairness

The court criticised the lack of disclosure of underlying material to justify the calculation of the "future business contribution" (set at 15% of annual pre-tax profits for the next four years, to be paid into the scheme fund available to scheme creditors). The lack of disclosure meant the court could not test or assess the board's conclusions that 15% was the greatest contribution that could be made.

The court held that the group had not given adequate reasons for saying that it would not be possible to engage with shareholders in a broader restructuring.

The court accepted that there was no requirement for a company proposing a scheme to provide scheme creditors with access to independent legal or financial advice, or to

actually negotiate the terms of the scheme. However, where this has not happened, the "take it or leave it" basis of the scheme may have a bearing on both the disclosure required and the court's willingness to defer to the creditors' vote when considering whether to sanction the scheme.

The court held that the explanatory statement gave scheme creditors the false impression that, absent *this* scheme being passed, the directors would have no choice in the matter and that insolvency would be automatic and imminent. The court also held that the explanatory statement ought to have explained the basis on which it was proposed that the shareholders were to retain the full equity interest (while the scheme creditors were taking a 90% haircut) and that this was in the best interests of the scheme creditors. There was no financial information or analysis to explain the allocation of the financial sacrifices of the two stakeholder groups.

The court therefore held that, given the limited financial sophistication of the consumer redress claimants, the explanatory statement was insufficient to inform them about the scheme and the realistic alternatives to it. Scheme creditors were therefore not properly consulted for the purposes of the creditors' meeting. The information was not sufficiently full or accurate to enable the scheme creditors to form a reasonable judgment on whether or not the scheme was in their interests.

Accordingly, the court was "most unlikely" to be able to place any reliance on the affirmative vote at the creditors' meeting. That conclusion was reinforced by the facts: the scheme creditors lacked any professional advice; there was no steering group; there was no negotiation; and the turnout at the meeting was less than 9% by number. In the circumstances, the court was not persuaded that it could properly place any reliance on the vote at the creditors' meeting or give effect to it.

Outcome

The court declined to sanction the scheme, on the above bases. It noted that "The FCA expects the directors to continue to explore and promote a restructuring which fairly allocates the benefits and losses among the various stakeholders. I agree with that, and would urge the directors to continue their efforts to promote a suitable restructuring."

Kirkland & Ellis represent the ad hoc group of Amigo's bondholders; the bondholders are not scheme creditors.

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- Restructuring

Suggested Reading

- 27 May 2021 Award Benchmark Litigation Asia-Pacific Awards 2021
- 21 May 2021 Kirkland Alert English Court Revokes Regis’ Company Voluntary Arrangement on Unfair Prejudice Grounds
- 20 May 2021 Award Chambers USA, America's Leading Lawyers for Business 2021

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