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# English Court Approves Restructuring Plan of Amicus Finance, Notwithstanding Opposition in Secured Creditor Class

19 November 2021

## At a Glance

The English court has handed down its judgment approving the restructuring plan of Amicus Finance plc (in administration) ("Amicus"), even though the senior secured creditor class had not approved the plan and notwithstanding opposition from a senior secured creditor, Crowdstacker.

This was the first restructuring plan promoted by insolvency officeholders and the first involving cram-down of a secured creditor. It was also the first mid-market company to use a restructuring plan; the total value of claims to be compromised under the plan was c.£32 million.

This restructuring plan provided for a solvent exit from administration, enabling Amicus to be rescued as a going concern. Whilst it is welcome (and unusual) to see an administration result in the rescue of a company *itself* as a going concern, the "cram-down" of a dissenting senior creditor class may concern the restructuring market. This is particularly so where the "restructuring surplus" (i.e., the value of potential future benefits that use of the business and assets might generate following the restructuring) has been ring-fenced for the existing shareholders in circumstances in which shareholders did not contribute substantial new value.[1]

The "art of the possible" for what constitutes a fair distribution of the "restructuring surplus" in future restructuring plans now appears uncertain, as the permissive approach taken in this case contrasts with much greater scrutiny applied by the court in previous cases (*Virgin Active* in particular) and the court's judgment provides little guidance on this question.

However, this case may be distinguishable in future cases given its specific facts, including:

- Amicus was already in administration, which created a class of administration expense creditors ranking ahead of the senior creditor class — i.e., this was not a "cram-up";
- Crowdstacker was unable to enforce its security given the administration moratorium;
- the relevant alternative to the plan was indisputably an immediate liquidation; Amicus presented the estimated recovery for Crowdstacker in liquidation as zero, i.e., Crowdstacker's security was said to have no value; in any event the court ultimately held Crowdstacker would be no worse off under the plan than it would be in a liquidation;
- the plan received near-unanimous support from every other creditor except Crowdstacker; and
- the nature of Crowdstacker's claim was unusual (it was a trustee for individual investors on a peer-to-business lending platform), which caused the court to doubt whether Crowdstacker's attitude reflected the wishes of those with the real economic interests in the relevant claims.

## The Restructuring Plan

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| **Company** | Amicus, a provider of short-term property finance that had entered administration proceedings in 2018. The business continued to trade within administration |
| **Purpose and Key Terms** | To compromise Amicus' liabilities to allow it to be returned to solvency (i.e., to be rescued as a going concern, exit administration and be returned to the control of its directors and trade for the benefit of its shareholders), and for creditors to receive more than they would if Amicus were placed into liquidation |

<table>
<tr><td></td><td colspan="2">Amicus' restructuring plan consisted of four key elements:<br><br>1. the release of all existing claims and security;<br>2. the injection of c.£4 million new funding;<br>3. the making of certain lump sum payments to creditors, out of the above new funding; and<br>4. a waterfall of payments from the proceeds of legacy loans to which Amicus was entitled.</td></tr>
<tr><td rowspan="6">Class Constitution and Voting</td><td>Class</td><td>Approvals[2]</td></tr>
<tr><td>1. Expense Creditors, i.e., those whose claims would be treated as an expense of the administration</td><td>100%</td></tr>
<tr><td>2. Senior Secured Creditor Class: Crowdstacker (as security trustee for c.400 individual lenders to Amicus via the Crowdstacker peer-to-business loan platform) and HGTL Securitisation, up to the value of Crowdstacker's debt</td><td>50.02% — i.e., short of requisite 75% approval threshold — i.e., class rejected</td></tr>
<tr><td>3. Junior Secured Creditor Class: HGTL Securitisation in respect of the balance of its claim, which the court found ranked junior to the above</td><td>100%</td></tr>
<tr><td>4. Preferential Creditors, i.e., those whose claims would be treated as preferential creditors under the Insolvency Act 1986 — primarily, employees</td><td>100%</td></tr>
<tr><td>5. Unsecured Creditors</td><td>99%</td></tr>
<tr><td>Alternate Comparator</td><td colspan="2">Compulsory liquidation proceedings, in which restructuring plan creditors were projected to receive significantly less than under the restructuring plan.</td></tr>
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| | The administrators estimated expense creditors would receive 52p/£ and all other creditors (including secured creditors) would receive nothing. Crowdstacker argued Amicus' estimates for recovery in liquidation were undervalued without good reason, because a liquidator could pursue certain claims in respect of antecedent transactions. |

## Convening hearing

Crowdstacker opposed the convening of plan meetings on various grounds, including class constitution.

*Class constitution:* The court directed the convening of an additional secured creditor class in addition to the four classes originally proposed by Amicus' administrators. This decision was based on conventional class constitution principles, given differences in existing rights and treatment under the restructuring plan.

This illustrates a notable development under the restructuring plan regime: courts have ordered the convening of additional classes under a number of restructuring plans: *gategroup* (splitting lenders and bondholders); *Hurricane* (ordering additional shareholder class) and now *Amicus* (splitting secured creditor class) — in each case, no doubt conscious of the court's ability to approve a plan that not every class has approved. This contrasts with the position in conventional schemes of arrangement, in which courts have been slow to "split the class"[3] because they have been concerned not to hand such a class a (potentially unwarranted) right of veto, given the need for *every* class to vote in favour of a scheme.

*Disclosure:* The court held that the usual requirements for the level of disclosure in the explanatory statement apply equally when those proposing the restructuring plan are professional insolvency officeholders. As usual, the explanatory statement must explain the commercial impact of the plan and must provide creditors with such information as is reasonably necessary to enable them to make an informed decision as to whether or not the plan is in their interests. "It is not enough for office-holders simply to state their conclusions as to the estimated outcome and implicitly to invite creditors to assume that because they are professionals that they will have got it right.”[4]

## Sanction hearing

*Legislative background:* The court may exercise its discretion to sanction a restructuring plan which not every class has approved, provided:

- no member of the dissenting class(es) would be any worse off under the plan than they would be in the event of the relevant alternative (which is whatever the court considers would be most likely to occur in relation to the company if the plan were not sanctioned) — the “no worse off” test, which was disputed in this case; and
- at least one class has approved the plan who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative — this was not disputed in this case given the approval of the expense creditor class.

*“No worse off” test:* It was common ground that the relevant alternative was liquidation. Crowdstacker argued that the “no worse off” test was not met, because Amicus’ estimated outcome statement undervalued recoveries in the hypothetical liquidation — specifically, because a potential liquidator could pursue litigation in respect of antecedent transactions, which would increase recoveries within liquidation.

The court noted that:

- avoidance claims would require investigation and prosecution, with inevitable expense and delay — which compared unfavourably with returns under the plan;
- Crowdstacker had not suggested a particular source or amount of funding to pursue such claims; and
- if there were serious avoidance claims which would (if pursued) have yielded a return, then the administrators would have been in breach of duty in ratifying certain transactions upon their appointment and/or would have unfairly harmed Crowdstacker’s interests. The restructuring plan explicitly preserved creditors’ rights to pursue claims against the administrators in respect of their conduct.

The court also held that, given a company in liquidation generally does not have a marketable goodwill, it was not significant that the estimated outcome statement failed to attribute any value to goodwill.

Accordingly, the court held that the administrators had successfully established that Crowdstacker was no worse off under the plan than it would be in the liquidation alternative.

## Learning points

This case and the judgments are very fact-specific, but the following points are of wider application.

- *Burden of proof for "no worse off" test* — the burden lies on the plan proponent to satisfy the court that, *on the balance of probabilities*, no member of a dissenting class would be any worse off under the plan than it would in the relevant alternative.
- *Court's reticence to become embroiled in detailed disputed issues* — the court is conscious that the utility of restructuring plans (and conventional schemes of arrangement) will be lost if the exercise is side-tracked into a time-consuming examination of detailed disputes without disclosure or oral evidence, and which has the potential to impose a heavy cost burden upon a company that is seeking rescue. The court seeks to maintain a careful balance between proper scrutiny and a proper outcome within the desired timescale.
- *Disclosure* — the touchstone is not whether the fullest specific information reasonably obtainable was included in the explanatory statement: it is whether what *was* provided was sufficient to enable the creditors to make an informed decision.
- *Valuation of claims against third parties* — whilst the court may consider potential claims which the plan company (or its insolvency officeholders) could pursue against third parties, the court's real focus is on eventual net recoveries which affect returns to creditors. The court will not conduct a "mini-trial" of potential "claw-back" claims without disclosure or evidence. The only purpose of examining such claims is to see whether they affect the outcome of the "no worse off" test.
- *Uncertainty of returns* — the court in *Amicus* did not consider it material that returns under the plan were uncertain, noting that returns in an immediate liquidation were even more uncertain.
- *Complaints against insolvency officeholders* — the court did not consider that

Crowdstacker's allegations that the administrators had mismanaged the administration had any bearing upon the exercise of the court's discretion; the restructuring plan itself permitted Crowdstacker to pursue any such complaints.

The convening judgment is here; the short-form sanction decision is here; the reasoned sanction judgment is here (handed down 15 November 2021).

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1. With the exception of a 7.5% shareholder in Amicus providing a new c.£3 million unsecured loan facility.↩

2. By value, of those voting.↩

3. Although if the scheme company is comfortable it would achieve the requisite majorities even if a particular class were split, it may decide voluntarily to split the class, in order to avoid debate as to the materiality of differences between creditors: see, e.g., *Nyrstar* and *Stemcor*.↩

4. Convening judgment at [102].↩

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