SUPERDRY RESTRUCTURING PLAN CASE PROVIDES INSIGHTS INTO DISCLOSURE

In a recent case *C-Retail Limited, Re* [2024] EWHC 1194 ("***Superdry***") the English High Court has provided some useful guidance on how parties should approach disclosure in the context of restructuring plans proposed under part 26A of the Companies Act 2006.

By way of reminder, restructuring plans may only be promoted where a company has encountered or is likely to encounter financial difficulties that are affecting or may affect its ability to carry on business as a going concern. A recent case relating to the retail group Superdry, is seeking to use a restructuring plan to compromise its liabilities under certain leases for retail premises that are no longer profitable. The restructuring plan forms part of a wider restructuring, which includes operational changes, an equity raise, and delisting.

Ordinary disclosure rules do not apply to restructuring plan and scheme cases

While restructuring plans involve court oversight and cannot go ahead without the court's approval, the ordinary rules as to disclosure in the Business and Property courts do not apply. The recent *Superdry* case provides a timely reminder of the differences that apply, the starting point being that in most cases the Explanatory Statement relating to a restructuring plan will (or, at least, should) provide sufficient information to enable creditors to make an informed decision as to whether to support or reject the compromise.

Increasingly, we have seen a number of contested restructuring plans, and those have included applications being made for additional disclosure. Generally speaking, the courts have recognised the need to deal with such requests in a proportionate manner. *Superdry* is the latest example of this, where the court was mindful of the special factors applicable in the context of restructuring plans including the fact that inspection and disclosure requests ought not to come at a time or be at a level that it is so burdensome that it becomes a distraction to the plan process itself.

Parties' approach in *Superdry* commended

In this case the plan company and the landlord who made the application were commended in their approach, and the importance of trying to resolve matters without recourse to the court if possible was highlighted. While the application for disclosure was for a wide range of documents, it was approached in a

Key issues

- The Explanatory Statement ought to suffice in most cases
- Applications for disclosure in the context of restructuring plans and schemes should not be:
  - burdensome
  - disproportionate; or
  - be a distraction from the process
- Commercially sensitive information can be protected by non-disclosure agreements
- Confidential information to be relied upon at the court approval stage can be included in separate bundles and if necessary aspects of the hearing can be heard in private

focused way, and the company too had in its response adopted a 'fairly generous' approach which meant that much of the application for disclosure was agreed upon. The court therefore only had to consider a limited number of documents that remained in issue, and unsurprisingly, they related to potential disputes on the relevant alternative to the plan creditors are being asked to vote upon.

Cash flow forecasts could be provided on a group basis rather than separate entity basis

These were sought on an individual company basis, but the plan company indicated that they were in fact only produced on a group basis and so separate forecasts did not exist in this case.

The judge considered that the plan company and its parent would either 'stand or fall together as part of the group and that it was the restructured group that would benefit from the surplus generated from the plan', so he held on that basis that the group cash flow forecast would suffice. The request for underlying granular data would be burdensome and disproportionate.

Expert report on valuation on rental agreements – fundamental to the estimated recoveries – the plan company could not limit disclosure to the applicant's lease

This had been referred to in the plan company's witness statement and in accordance with ordinary principles under Part 31.14 of the Civil Procedure Rules, thus ought to be disclosed unless the plan company could establish why it should not do so. The plan company had offered to redact the report so that it was limited to the leases relating to the Oxford Street premises and the applicant. This, however, was rejected by the court on the basis that it formed a significant element of the calculation for the estimated recoveries in relation to the return to creditors generally in the relevant alternative when compared to the plan. The court considered that the additional information could impact upon whether creditors have been properly allocated to the different classes for the purposes of voting on the plan, which potentially could necessitate a further hearing before the creditors are asked to vote on the plan.

Target operating model

On the evidence, the judge held that this was not a document in existence, and as such the plan company had sent certain related information and agreed to address further issues in a meeting should they arise, but this was on the premise that any further disclosures would not be a distortion of information available to some, but not other creditors. This latter point is important in the context of restructuring plans generally and the need to ensure that all creditors have access to the equivalent information.

Fairness

While not the focus of this application, the judge did allude to how the court might approach the sanction hearing and in particular issues relating to its consideration as to the fairness of the plan. Interestingly, the comments made do not seek to distinguish between the different approaches for schemes and restructuring plans that do not include cross class cram down and restructuring plans that do seek approval on this basis. Earlier in the year, the Court of Appeal in *Re Adler* provided guidance on the different approach to fairness in cross class cram down cases, relating to the appropriateness of considering whether a fairer plan is available. This may simply be as a result of the judge in this case seeking to summarise the general position.

Confidential information – the practical workarounds

In relation to the practical insights on confidential information, the court suggests that parties may engage techniques developed in intellectual property cases as they provide a good model to deal with confidential exhibits, confidential hearing bundles, supplementary confidential skeleton arguments and applications for part of the hearing to be held in private.

Conclusion

In summary, this case provides some excellent insights into the court's likely consideration of disclosure applications and in particular is mindful of the burden that such applications may cause, but must of course balance these concerns against the need for creditors to have sufficient information to enable them to decide whether to support or reject the plan. This will also be a consideration at the court sanction hearing, where once the creditors have voted on the plan, (and subject to at least one class of creditors who are 'in the money' voting in favour of the plan, and any dissenting classes of creditors being no worse off than in the relevant alternative), the court will be invited to approve the plan. The court must be satisfied that the plan is fair and the adequacy of the disclosure will feature in its considerations in deciding whether to approve the plan. The case is therefore a good reminder to those proposing a restructuring plan to ensure they make adequate disclosures at the outset to avoid unnecessary delays and costs and the risk of the plan not being approved.

The court is also alive to untargeted or strategic applications for disclosure in the context of restructuring plans and schemes where companies are facing distress and require the court's approval to a compromise to resolve its financial difficulties. Such applications are not entertained by the court and parties behaving in an unreasonable manner also run the risk of adverse costs awards against them.

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