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Case No: CR-2021-00584

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London

Before:
SIR ALASTAIR NORRIS

IN THE MATTER OF ALL SCHEME LTD
and
IN THE MATTER OF THE COMPANIES ACT 2006

Mr R Dicker QC and Mr C McLaughlin instructed by **Freshfields Bruckhaus Deringer LLP** appeared on behalf of **the Applicant**
Mr R Fisher QC instructed by **Reynolds Porter Chamberlain LLP** appeared on behalf of **the Independent Scheme Assessor**

Hearing date: 30 March 2021

APPROVED JUDGMENT

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SIR ALASTAIR NORRIS:

1. ALL Scheme Ltd ("the Company") was incorporated on 6 January 2021 as a company within the Amigo Group. The principal operating company within the Amigo Group, Amigo Loans Ltd ("the Lender"), has since 2005 offered personal loans secured by guarantees. According to the evidence it has entered into some 927,000 agreements with over half a million borrowers and well over half a million guarantors. The customers using this facility tended to be outside mainstream credit provision and it has been suggested are from groups where literacy levels may not be high.

2. The Lender faces severe cashflow difficulties caused, firstly, by the Covid pandemic (which has enabled some 63,000 customers to take advantage of a payment holiday with a consequent severe impact upon cashflow); and, secondly, by the volume of consumer complaints. These complaints have led, in the case of borrowers, to redress claims for the repayment of interest and of costs incurred in relation to loans that ought not to have been made, together with 8 per cent interest on that redress. The exposure of the Lender is something in excess of £150 million. In addition, the consumer complaints have given rise to Financial Conduct Authority ("FCA") investigations and have generated a liability for case handling fees payable by the Lender to the Financial Ombudsman Service ("FOS") of some £10 million.

3. A combination of these factors meant that the Lender incurred a statutory loss for the nine months ending 31 December 2020 of £86.8 million. This has put its solvency in issue. The Board of the Lender have concluded that there is in the circumstances a real prospect of administration resulting from this financial pressure.

4. The Lender's operations were funded from two principal sources. First, the proceeds of a bond issue by an associated company, which bonds were guaranteed by the Lender and secured by a first ranking charge over its assets, i.e. its loan book. Other Group companies have joined in this guarantee to the bondholders, but their own asset position means that they are unlikely to make a sufficient contribution to relieve the Lender of the burden of its guarantee liabilities to any material extent.

5. Secondly, the Lender has advantage of a £250 million securitisation facility which is secured by an equitable assignment of parts of its loan book to a securitisation special purpose vehicle. The aggregate secured lending was on 31 December 2020 some £346 million and it is estimated to be £324 million as of 30 April 2021. The estimated realisable value of the Lender's assets lies within a range of £312-325 million, depending upon whether

the policy for realisation of those assets is slanted towards speed or towards value realisation. In an administration, accordingly, there would be no distribution to unsecured creditors (allowing for the estimated costs of an administration which were put at £37 million) because of a shortfall in the value of the collateral. The Lender has prepared an estimated outcome statement which is in evidence. It has been reviewed by PwC who conclude that its contents are reasonable.

6. In these circumstances, the Company was incorporated to promote a scheme of arrangement relating to the Lender's liabilities to certain of its unsecured creditors (being customers with possible redress claims and the FOS for outstanding case handling fees). The object of the scheme is to establish a scheme fund with three contributory sources. First, an initial contribution of some £15 million. Second, that initial contribution will be topped up if the anticipated claims are in fact lower than at present thought (so that loan recoveries are enhanced by a reduction in set-off claims) and that additional contribution will be in a phased amount up to £20 million. Third, there is to be a contribution from the profits of the Lender of 15 per cent of profits before tax for each of the ensuing four years. In bare outline, the scheme provides for a six-month period within which a scheme creditor will be able to submit an online claim for redress in respect of any claim that creditor has in relation to an Amigo loan. There will otherwise be a bar date barring further claims by borrowers or guarantors. Such a claim will be subject to agreement by the Company or determination by an adjudicator under an independent scheme of adjudication.

7. Significant detail is provided in relation to the scheme in the draft Explanatory Statement which reveals that, in part, this claims scrutiny process will be automated. Each claim will be passed through an automated analytical framework. Any claims rejected by that process will then be manually reassessed by primary and secondary reviewers and, if the claim is still being rejected, then there will be a process of appeal to an independent adjudicator. That adjudicator will be a reputable organisation of independent standing. It had been proposed that it should be Grant Thornton, but it may well be another similar appointee.

8. Having mentioned Grant Thornton, I should say that Grant Thornton was appointed as a skilled person under section 166 of the Financial Services and Markets Act 2000 and undertook an examination of the methodology to be adopted in claim scrutiny. It is at present satisfied with what is proposed. It should also be noted that if the claim scrutiny process proves unsatisfactory then the FCA can intervene in the process. Once the claim has been scrutinised for viability, then it will be subject to a process of calculation. The claim will be assessed and then adjusted in the light of any sums which are due to the Lender from the

scheme creditor. So, the redress goes first to reduce by way of set-off any outstanding loan. I must revert to this point later.

9. The final step is that the scheme creditor is entitled to a pro rata distribution from the scheme fund as so enhanced, as indicated, and in return releases the Company, the Lender, and other Group companies from liability for the redress claim.

10. It is anticipated that this process will yield roughly 10 pence in the pound in respect of redress claims but that that amount will increase in the event that there are further contributions from the profits of the ongoing business.

11. In order for the scheme to be effective, the Company has become co-obligor with the Lender for the purposes of creating a relevant liability to be compromised by the scheme.

12. This is an application for the convening of a single meeting of scheme creditors. At such a hearing, it is not my function to consider the merits of the scheme. The FCA has prepared a letter for the court to make known its view that it does *not* support the scheme because (a) the scheme creditors do not receive the full value of their scheme redress claims but only a 10 per cent distribution; (b) the claim settlement process, being in part automated, is less thorough than the methodology adopted by the Financial Ombudsman Service; and (c) the FCA does not welcome the presence of a bar date. However, their letter concludes, in my judgment correctly, with a recognition that these are ultimately matters for scheme creditors to consider at a meeting and for the court to consider at a sanction hearing and do not have an immediate impact on the matters for decision at this hearing.

13. The function of the convening hearing can conveniently be summarised by reference to the Practice Statement of 26 June 2020 as falling under three heads. First, it is an opportunity to address jurisdictional questions raised by the Company or by scheme creditors, particularly in relation to class composition. Secondly, it affords the court the opportunity to scrutinise the arrangements for ascertaining the will of scheme creditors. Thirdly, it addresses any obvious roadblocks that would render a sanction hearing without point (because whatever the decision of the scheme meeting, it is unlikely that it can effectively be sanctioned).

14. I will look first at jurisdiction questions. Some are very simple. First, the Company is plainly "a company" for the purposes of Part 26 of the Companies Act 2006. Second, the scheme is plainly a "compromise or arrangement" within section 895 containing the requisite elements of give and take. The scheme creditors take the benefit of the claims realisation process and distribution out of the scheme fund and in return they release the scheme claims. But the class composition questions are of great importance.

15. It is for the Company to consider the number and constitution of the relevant classes. The principles are well known deriving as they do from the classic statement of Bowen LJ in *Sovereign Life v Dodd* [1892] 2 QB 573 at 583. They are so well known and so often repeated that it is unnecessary for me to provide extensive citations here. It is sufficient to note five points.

1) The general starting point is that there should be a single class meeting.
2) That single class will be fractured where the rights of those attending are so dissimilar as to make it impossible for them to consult together with a view to their common interest. It is notable that in that well hallowed formulation the test is that it should be "impossible" for them to consult together.
3) It is recognised that class members with different rights, but rights that are not *sufficiently* dissimilar, can therefore confer together. When we are talking of "rights" we are there talking of comparing the rights of scheme creditors as matters stand (or would stand in a realistic alternative to the proposed scheme) and as they stand under the proposed scheme.
4) The focus is on "rights" and not on commercial or personal interests. As an illustration of that, some contributors to the debate have pointed out that there may well be different attitudes to the scheme as between borrowers on the one hand and guarantors who have paid the borrowers' liability on the other, because a call on a guarantee would have generated family tensions. But the focus is not on family tensions or on personal relationships but on legal rights.
5) The relevant rights are those which in reality currently exist and those under the scheme that will replace them.

16. With those broad principles in mind, I have approached the class composition questions. I should say at the outset that I accept the submission that, as a matter of principle, no fundamental dissimilarities necessitating a fracturing of the class arise in this case.

17. The meeting will consist of (a) borrowers with "affordability" claims, (b) borrowers with other "unfair treatment" claims, (c) guarantors with redress claims, (d) the Financial Ombudsman Service with its fee claim, (e) borrowers with outstanding loans (to which set-off may be applicable) and (f) former borrowers and others whose entitlement will be only to a dividend out of the scheme. But whatever their source, all these are unsecured claims in respect of which no distribution would be made in an alternative insolvency scenario, and in respect of which current borrowers would have set-off rights in that alternative insolvency scenario. Such a situation arises as much in insolvency as under the scheme. If one focusses

on comparing rights and not on interests, I am of the view that these scheme creditors can confer together.

18. Having expressed that summary, I should refer to six points which have arisen for particular consideration. The Company appointed RPC as an independent scheme assessor. This is an unusual course; but what was intended was that RPC should collate, analyse and present creditor responses. RPC has prepared a report which I have read and on which I have received submissions from Mr Richard Fisher QC.

19. The first point is that the RPC report notes that in three out of the 375 email responses received, the suggestion has been made that scheme creditors with outstanding loans should be placed in a separate class from other scheme creditors because their redress will be set off against their outstanding loan at full value whereas other claimants will receive only a 10 per cent dividend on their claims. It is said that the effect of the scheme is therefore different.

20. This is a simple reflection of the reality of the alternative insolvency scenario. The set-off right exists in insolvency. The set-off right is preserved under the scheme. There was no suggestion that they were materially different rights. Schemes do not generally divide creditors into those with rights of set-off and those without; and I see no reason to do so in the instant case. Indeed, I see some difficulty in class definition. Why should a current borrower with a liability of say £100, and thus the availability of a set-off right, be placed for voting purposes into a different class from a scheme creditor who has paid off his £100 loan? For both, the principal benefit will be speedy establishment of the redress right and a distribution out of the scheme fund. The question which faces each scheme creditor is whether that scheme creditor prefers (a) to have the claim determined by the scheme process and to receive a distribution of 10% of that claim out of the scheme fund (subject to available set-off) or (b) to prove the redress claim according to a statutory process in an insolvency but probably to receive no distribution (subject to available set-off). That is a question common to all scheme creditors: as is the question whether to vote against the scheme in the hope of eliciting an improved outcome.

21. The second point noted in the RPC report is that it has been suggested that there is a potential difference in respect of a borrower whose loans have been securitised or sold on and a borrower whose loans remain with the Lender, because in relation to loans which have been securitised or sold on, the set-off mechanism to reduce the outstanding balance is difficult to apply. That would, of course, also be true in relation to such loans in an administration of the Lender. However, the scheme in fact provides for the Company to treat securitised loans as if they still belonged beneficially to the Lender and an obligation to use best endeavours to

obtain a reduction of the loan from any third-party purchaser of it. The third-party debt purchaser which the Lender has used has hitherto been willing to sell back its loans to the Lender: and so no difficulty is anticipated in carrying out this "best endeavours" obligation. Scheme creditors will not be disadvantaged by reason of what the Lender has done with the loans.

22. The third point noted in the RPC report is that under the scheme a guarantor may have paid not only interest and costs but also some or all of the principal. If the guarantor receives redress, concern was expressed about the effect of that reimbursement of principal upon the original borrower's liability. Would it revive or would it not? Under the scheme it does not. It is then suggested that write-off is an additional benefit which borrowers in such a situation enjoy out of the scheme which other borrowers do not. But in truth, this is not a material difference which is sufficient to fracture the class. Of course, the scheme will, depending on personal circumstances, have a different effect; but the scheme is not designed to favour one class as against another.

23. A fourth point made in the RPC report is that the scheme may treat unfairly borrowers who have re-financed their borrowing. That is to say they have taken out a loan with Amigo, got into difficulties, and re-financed that with borrowing from another finance institution to whom they still owe money. Had they remained a current borrower from the Lender then they would have had a right of setting off their redress so as to reduce the outstanding loan balance; but because they have re-financed their loan they are deprived of this opportunity of set-off and owe the original amount to their new lender. The same point has been made in relation to borrowers or guarantors who have entered into an IVA because of their obligations to the Lender. In each case this is simply a reflection of events which have occurred, with what the borrowers or guarantors have done with their loan obligations. As regards their rights against the Lender, the essential question on which everyone must vote remains whether they should receive a payment in respect of their claim out of the scheme fund, or whether in the likely alternative scenario, they should advance their claim in an insolvency and receive nothing. The issue is, I think, essentially a *fairness* question and not a *class composition* question. One cannot create sundry small classes of scheme creditors reflecting the precise personal circumstances of individual borrowers in the light of their subsequent dealings with their loan obligations and so create the possibility for multiple vetoes.

24. A fifth point made has been that because some of the data has been either anonymised or lost in relation to older loans, it may be more difficult for customers to prove that they are scheme creditors. In practice, this group is likely to be extremely small because each

customer will have something – a loan agreement, a guarantee, a statement – that enables their relationship with the Lender to be traced. Again, it is inappropriate to create a special class for a small group for whom the same fundamental questions in relation to the scheme arise. But a solution is proposed in that the Chairman's report of the scheme meeting will identify those customers in respect of whom there has been some difficulty in tracing their claim and the significance of that class upon the outcome of the meeting can be assessed at the sanction hearing.

25. A final point made in relation to class composition is that it is proposed under the scheme to include borrowers who have loans more than six years old. Indeed, it is proposed to go back to the start of the business in 2005. Some of those loans will be outstanding for longer than the limitation period. The point is made that statutorily barred claims ought not to be in the same class as those of the holders of current claims, but I do not think that this introduces an element of fundamental dissimilarity.

26. The problem is that the six-year limitation period is itself somewhat arbitrary. Many of the borrowers who wish to pursue redress claims will not have realised that they had redress claims and so will have available to them an extended limitation period. It cannot be sensible to examine each claim to see whether an extended limitation period applies to it and to treat such claimants in a different way. It is also true that in the alternative situation of an administration, it is unlikely that an administrator would take a limitation point of that nature against a consumer. So, in truth, although statutorily barred claims are included, and those who hold statutorily barred claims perhaps get an additional benefit from the scheme (by reason of inclusion) over and above that available to borrowers with current claims, I do not think it makes a sufficiently significant difference to fracture the class.

27. It is for those reasons and having considered the various points made both by individual respondents and by journalists in the specialist media (for example, Debt Camel and MoneySavingExpert) who have scrutinised the current proposal, I do not think it is necessary to fracture the class and that a single class meeting will serve the purpose. Of course, whether the outcome of the meeting in the light of its constitution provides something on which the Court can rely at the sanction stage, will be up for scrutiny in review in the light of the actual outcome of the meeting and the terms of the Chairman's report, along with the broader "fairness" questions.

28. My second function is to consider the arrangements for ascertaining the will of the scheme creditors. There are six heads that I must here examine.

29. First, I consider that adequate notice of this convening hearing was given to those affected by the scheme. What is sufficient time and adequate notice has to be determined on a case-by-case basis, having regard to the complexity of the scheme and the urgency of the implementation of the scheme, both from the Lender's point of view and from the point of view of those scheme creditors whose complaints are being held in limbo pending the consideration of the scheme.

30. A link to the Practice Statement Letter was sent to all scheme creditors for whom the Lender had contact details, some 89 per cent of potential creditors, by 1 February 2021. The Practice Statement Letter was also posted on a scheme website on 25 January 2021. It was also the subject of advertisement on 29 January 2021 in the Daily Mirror and the Daily Mail, being the sections of the press considered most likely to be read by the demographic which utilised the Lender's facilities. This has meant that there has been some eight weeks for consideration and considerable press comment about the scheme. It is, I think, sufficient as a lead-up to the convening hearing.

31. I must secondly consider the information in the Practice Statement Letter. Paragraph 7 of the Practice Statement sets out the nature of the information that must be conveyed. I have read the Practice Statement Letter. I consider that it conveyed adequate information and in a form that was generally capable of being understood by the relevant constituency. That seems to be demonstrated by the level of engagement following the circulation of the Practice Statement Letter. Of course, one cannot ensure that every reader has understood the Practice Statement Letter. Indeed, there were a few email respondents who thought that the letter related not to a scheme for the settlement of their claims but to the commencement of a class action against the Lender. But such misunderstandings cannot be entirely avoided.

32. There has been some criticism that the Practice Statement Letter was couched in language which some recipients would have found difficult to understand. To meet such criticism, the opportunity now arises in the Explanatory Statement to express the fundamental questions in a different and perhaps more easily assimilated form. Again, a balance has to be struck between conveying information accurately and conveying it in summary terms capable of being understood by the majority of the constituency to whom the letter is addressed. It cannot be the case that the letter has to be addressed by reference to the lowest common denominator.

33. The third matter to be addressed is whether there is sufficient clarity in the Explanatory Statement having regard to the constituency to which it is addressed. It is not my function to approve the Explanatory Statement; but it is my function to consider whether there are any

glaring deficiencies in it such as would make the convening of a meeting without point. I note that care has been taken with the language and with the degree of formality in the document. Whilst it is essential that the formal requirements must be satisfied, it is right to note that above and beyond the Practice Statement Letter itself, the Company has prepared additional easily accessible material to support an understanding of the Explanatory Statement. These include six videos which are to be posted on the scheme website and a social media campaign. The efficacy of this will, of course, be reviewed at the sanction hearing.

34. I have said that it is not my function to approve the Explanatory Statement; but I have in the course of the hearing invited the Company to give some thought to providing a short statement of the scope of the claims covered with clear emphasis upon the fact that if any scheme creditor thinks that they have any claim then they must make it to avoid the bar. I have further suggested that some of the questions which have actually been raised by email respondents to the Practice Statement Letter might be incorporated into an FAQ section, perhaps to be hosted on the scheme website and referred to in the Explanatory Statement since I am told that that is thought to be a more effective way of communicating information. But in terms of formal effectiveness, I see no obvious deficit in the Explanatory Statement, though its sufficiency is ultimately a question for the sanction hearing.

35. Fourth, I must look at the arrangements for the scheme meeting. The scheme meeting it is proposed should be held some six weeks hence, more than five weeks after the receipt of the scheme documents. The question is whether this may be regarded as adequate time for the consideration of the scheme, and for taking advice upon its relatively straightforward nature in circumstances where (a) a degree of urgency arises from the Lender's financial state, and from the suspension of dealing with claims pending the conclusion of the scheme process; and (b) taking into account that the Practice Statement Letter was circulated some eight weeks ago, considerably earlier than one encounters in many schemes. Whilst every case turns on its own circumstances, the period proposed here is the same as that accepted as sufficient by Zacaroli J in *Re Instant Cash Loans Limited* [2019] EWHC 2329 (Ch), a not dissimilar case to the present.

36. Fifth, I must consider the method of participation at the scheme meeting. It may be assumed that there will be difficulties in holding a physical meeting, so what is proposed is a webcast plus a telephone facility with voting for the meeting being available via an online portal. That will remain open during the scheme meeting itself. The arrangements have obviously been prepared with the principles outlined by Trower J in *Re Castle Trust Direct*

Plc [2020] EWHC 969 (Ch) at [42] to [43] well in mind. I do not consider that there is any flaw in these arrangements at an organisational level. Whether they are in fact effective will be disclosed in the Chairman's report which will be considered by the court at the sanction hearing.

37. I must sixthly examine the voting arrangements. In order to secure approval, the scheme must secure the support of the majority in number of those attending the scheme meeting and 75 per cent by value. The numerosity test raises no issue in the present case but there has been some comment about valuing the claims of participating creditors. The approach to valuing the claims could adopt a position somewhere along a spectrum which at one end treats all unliquidated claims as valued at £1 each (with the consequence that the scheme creditors who are redress creditors would be dominated by the claim of the Financial Ombudsman Service which stands at £10 million) and at the other end of the spectrum, could depend on an estimate of each individual claim advanced by a scheme creditor. But with potentially a million scheme creditors, both borrowers and guarantors, it is impossible to conceive a machinery that would enable them to submit their claim in advance of the scheme meeting so that its value can be accurately assessed.

38. What one is looking for is some practical machinery which enables weight to be properly and appropriately distributed amongst the voting scheme creditors. What the Company proposes to do is to assume that all loans and all guarantees have been mis-sold and to admit the claim for interest and costs less outstanding balances in respect of borrowers and the amount paid by the guarantor in respect of guarantees. This is a sensible attempt at making a reasonable assessment of the value of a redress claim for voting purposes; of course, it must be emphasised that it is *for voting purposes* and not for acceptance and payment within the scheme. No other practical arrangement has been suggested and I am content with the voting arrangements which are proposed.

39. I have now considered the class composition issues that have been raised and the arrangements for the ascertaining of the will of the scheme creditors and I lastly turn to the question of whether there are any obvious roadblocks in the way of the acceptance of the scheme should the scheme meeting approve its terms. There are three short matters that I should address.

40. The first relates to the use of an SPV as the scheme vehicle. I have previously expressed the view that this does not raise a jurisdictional question though it may go to the exercise of discretion at the sanction stage: see *Re AI Scheme Limited* [2015] EWHC 1233 (Ch) and *Re PizzaExpress Financing 2 Plc* [2020] EWHC 2873 (Ch). But the matter has

more recently been thoroughly examined by Zacaroli J in *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) and I prefer to rely upon his views. In the instant case, the use of the Company to promote the scheme has avoided the necessity to seek a waiver from the secured creditors and it has the advantage of separating out the ongoing business of the Lender from the mechanism of adjudicating and paying redress claims. Once again, although the matter will be examined again at the sanction hearing, at the present stage of proceedings it is not an obvious roadblock in the way of scheme approval.

41. The second matter is that under clause 2.8 of the scheme document the scheme creditors authorise the scheme supervisors to execute a Deed of Release relating to all scheme creditor claims against the Lender, its associated portfolio management company, its parent company, and their directors and employees in respect of liability for scheme claims. The inclusion of a release does not constitute a blot on the scheme if it is necessary to give effect to the rearrangement of rights between debtor and creditor. In *Re Lecta Paper UK Limited* [2020] EWHC 382 (Ch) at [21] Trower J explained that where there are co-obligors (as there are in the instant case) it is necessary, in order to make effective a scheme of arrangement with one obligor, that the co-obligors are also released (in order to avoid what has been called the “ricochet” contribution claim). I agree with this analysis and adopt it.

42. Thirdly, it is necessary to consider the attitude of the FCA. I have already referred to the letter which the FCA sent to the Company indicating that, whilst it does not support the scheme, it was not going to take any regulatory steps or to appear at today’s hearing (or I think the sanction hearing) to oppose the scheme, although it reserved the right to take either step. The assessment of the FCA is, of course, broader than that of the Court. Its concerns that the scheme payments are significantly less than the value of the claims and that the methodology for claim assessment is not the same as that adopted by the Financial Ombudsman Service are points that it is entitled to make and will weigh with the scheme creditors when they come to consider the scheme. But the FCA accepts that it is indeed for the scheme creditors and for the court to make its assessment of the scheme. Its present attitude, and the reservation of its rights to seek to appear and oppose, do not represent a “roadblock” standing in the way of the scheme such that it is without point to convene a meeting.

43. In these circumstances, I shall convene a single meeting of creditors in accordance with the draft order which is proposed.