

PART 26A RESTRUCTURING PLANS AND HOLDCO FINANCINGS

20 July 2021 | London
Legal Briefings

THE BACKGROUND TO RESTRUCTURING PLANS

When the UK Government announced a package of measures to support businesses during the pandemic, they included a new restructuring tool – the restructuring plan (or RP) under Part 26A of the Companies Act 2006.

The RP is a very powerful restructuring tool. Principally because it allows a compromise to be imposed against the wishes of dissenting classes of creditors provided that at least 75% by value of one class with a genuine economic interest has approved the RP and all dissenting classes receive more under the RP than in the "relevant alternative" (which will generally be an administration or liquidation).

Distressed companies and their stakeholders have in recent months been pushing the boundaries of RPs. The English Court decided in May this year that cramming down classes of creditors (in that case landlords) who have overwhelmingly voted against an RP is principally a question of valuation¹. This in many ways offers less protection to junior creditors than previously indicated and confirms that RPs are likely to become the tool of choice to restructure complex businesses of scale.

HOLDCO FINANCING

HoldCo financing structures have become increasingly prevalent in the capital stack over the past decade with many equity investors, in particular on infrastructure transactions, using HoldCo facilities to fund acquisitions or recycle equity investments. Institutional investors and other lenders with higher risk appetites are equally increasingly writing HoldCo loans to achieve higher returns in a competitive and liquid market.

HoldCo lenders are structurally subordinated to the creditors of the underlying OpCos and do not benefit from asset level security. They are entirely reliant on cashflows being upstreamed by the OpCos and security over the shares in the OpCo or its shareholder. A HoldCo financing is completely separate to the underlying OpCo senior financing and there is no intercreditor agreement between the two sets of lenders.

CONSEQUENCES OF AN OPCO RP FOR HOLDCO FINANCING

While HoldCo lenders already appreciate and factor in the risk of enforcement action by the OpCo senior lenders, RPs add another tool for distressed companies. Crucially, the evidential standard required to satisfy the English Court as to the value of the business may fall short of contractual protections negotiated in intercreditor agreements (such as fairness opinions, a public marketing process or an administrator being satisfied proper value has been obtained).

Among other outcomes, an RP proposed at the OpCo level could result in the issue of shares to a new party (possibly the original sponsor) and the dilution of the existing shareholders' interests (and thus the interest of the HoldCo lender). One RP has already been proposed along these lines (seeking to issue bondholders with 95% of the equity in an operating business). Whilst this RP was rejected by the Court for reasons specific to its particular facts, it shows that RPs are capable of being used to issue new shares on a non-pre-emptive basis and potentially disenfranchising Holdco lenders.²

While this development is unlikely to curb lender and sponsor appetite for HoldCo financings in the current market, HoldCo lenders and their credit committees may wish to consider the additional risk (and opportunity) posed by RPs. In distressed scenarios going forward HoldCo lenders are likely to want to guard against the risk that a strong sponsor seeks, through an RP, to do a deal with the OpCo financiers that dilutes HoldCo rights. While HoldCo lenders may in these circumstances already have a seat at the table as a result of an event of default, timing and the ability to act quickly will be a key issue. The timeline for an RP can be as short as six to eight weeks and so HoldCo lenders may need to make accelerated decisions in respect of the enforcement of security and any other rights or otherwise any proposal to participate in the provision of additional capital.

RPs are likely to be an attractive way of restructuring complex transactions going forward. HoldCo lenders should ensure that they have appropriate covenants (in particular information covenants) to give them timely notice of any circumstances which may lead to an RP and that they are also prepared internally in terms of understanding the RP process and being in a position to make accelerated decisions should the timeline require.

¹ *Re Virgin Active Holdings Limited* [2021] EWHC 1246. See our more detailed briefing [here](#).

² *Re Hurricane Energy PLC* [2021] EWHC 1759 (Ch)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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