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A scheme for one, a scheme for ALL? English High Court develops thinking on alternative scheme of arrangement options

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In a recent judgment of the English High Court in *Re ALL Scheme Limited* [2022] EWHC 549 (Ch), Lord Justice Snowden approved a novel approach to schemes of arrangement, by which creditors will be given the opportunity to vote on two alternate schemes at a single creditors' meeting.

The alternative schemes are mutually exclusive in that one provides for the underlying business to continue as a going concern, while the other will see the business informally wound down.

This decision is believed to be the first in which creditors will be asked to vote on competing options and effectively be able to decide the future conduct of the debtor company.

Amigo Loans Ltd (**ALL**) is a provider of consumer guarantor loans. These are loans to persons who, usually due to poor credit history, are unable to borrow from mainstream lenders, with the loans being guaranteed by third parties with a stronger credit history.

ALL granted nearly 1,000,000 such loans since it commenced operations in 2005. ALL has since been subject to a vast number of consumer complaints in respect of its lending practice, typically for mis-selling. The majority of the claims have been made to the Financial Ombudsman Service (**FOS**).

Each complaint gives rise to a contingent liability in respect of the consumer, and a statutory fee which must be paid by ALL as the regulated entity regardless of whether the claim is adjudicated in the consumer's favour or not. In addition, ALL is the subject of an ongoing Financial Conduct Authority investigation, which may result in a financial penalty and further liability for ALL. As a result, ALL is balance sheet insolvent, with estimated liabilities totalling £597m and assets of £473m.

ALL has ceased to trade while it seeks to restructure its business via a scheme of arrangement.

A previous scheme proposed by ALL obtained 95% creditor approval but was refused sanction by the Court on the basis that (i) creditors' rights were being severely compromised while shareholders rights would not be impacted, and (ii) the Court considered that insufficient information had been given to creditors. ALL has since returned to Court seeking leave to convene a new scheme meeting to vote on both alternative schemes.

At the leave to convene hearing, ALL argued before Snowden LJ that the best return for creditors would be realised if it were allowed to re-commence its lending business, injecting the funds generated by the business

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into a scheme trust fund to be used to satisfy creditor claims, being those of both consumers and the FOS[1]. The alternative, it argued, was for ALL to immediately enter either informal winding down or formal administration, either of which would yield a delayed and lower return for creditors. The currently proposed schemes are, in summary, as follows:

- The first is the 'New Business Scheme' premised on a resumption of trading and is expected to see creditors receive between 33 – 41p on the pound, with a final payment likely in either November 2023 or May 2024;
- The second scheme is the 'Wind-Down Scheme' by which the business will be wound down without a resumption of trading and is expected to see creditors receive 33p on the pound, with a final payment in May 2024.

The Court was satisfied that all consumer creditors and the FOS ranked as a single class. Traditionally a single class of creditors will be presented with a single proposed scheme, which they can elect to support or oppose. However, in the present circumstances the Court was satisfied that presenting creditors with a broader range of options served to save the time and expense of having to devise and promote a further scheme should the first option not succeed (whether because of insufficient creditor support or the Court refusing to sanction it).

On this basis, the Court approved the convening of a creditors' meeting at which **both** proposed schemes would be presented to creditors for voting. In order to pass, each scheme must be approved by creditors representing 75% in value of the total creditor claims *and* a majority in number of creditors attending the meeting (whether personally or by proxy). In the event that both schemes obtain the requisite creditor approval, we anticipate that ALL will seek sanction of the New Business Scheme in the first instance and only look for sanction of the Wind-Down Scheme should the Court refuse sanction of the New Business Scheme.

This novel and flexible approach reflects commercial common sense and is a welcome development to the law of schemes of arrangement. The ability to promote alternative schemes in this manner represents a pragmatic use of company (and Court) resources, which may avoid protracting a restructuring process by repeated sequential attempts at securing a scheme.

However, it remains to be seen how the use of dual schemes will develop in practice, and will be equally interesting to see if this approach is taken up in the Cayman Islands.

[1] The FCA indicated that, if it considers that a financial penalty should be imposed, it will take into account the priority of creditor claims to ensure that any fine does not impact the amount payable to creditors under the schemes.

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