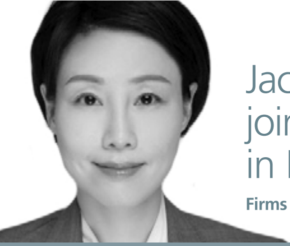

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After two wins, UK taxman wants more 'Crown Preference'

For the first time the UK court rejected a Part 26A Restructuring Plan (RP) that used the new legislation's cram-down powers, not once, but twice. And now the victorious UK taxman, HMRC, wants to amend the Part 26A legislation to permanently block any future attempts to cram it down.

The separate court decisions to reject the RPs proposed by Nasmyth, a precision engineering company, and Great Annual Savings (GAS), an energy efficiency consultancy, do not block future attempts to cram down the tax authorities. They do, however, reflect a new determination by HMRC not to be caught out, as it was last year when it failed to hire counsel or even attend court when an RP was used to cram it down in Houst, a holiday rentals company.

The two judgments together dispel the notion that that small companies can easily ditch their tax liabilities.

For the full GAS judgment, click here:
http://www.globalturnaround.com/documents /GreatAnnualSavingsJudgment.pdf

For the full Nasmyth judgment, click here:
http://www.globalturnaround.com/documents/NasmythJudgment.pdf

There is now speculation that the UK tax authorities will seek to amend the legislation, only introduced in 2020 as part of the CIGA reforms, to prevent any compromise of their debt using an RP.

This would constitute a further strengthening of "Crown Preference," legal protections for HMRC which put it at the top of the insolvency 'waterfall'. Crown preference was abolished in 2002 but then reintroduced three years ago, much against the pleas of business lobbyists as well as many restructuring professionals.

The decisions also make less likely the possibility that the Part 26A legislation would be amended to reduce the number of meetings required from two to one, for small businesses.

GAS runs out of gas

Mark Fine, a partner at McDermott Will & Emery, commented: "The decision by the High Court refusing to sanction the Great Annual Savings restructuring plan highlights how HMRC has decided to take a more active role in sanction hearings.

"Their fateful decision to passively oppose the Houst restructuring plan resulted in their cram down as a class," said Fine. "It is clear they have learned from that given the far more active role they have taken here in court to resist the plan.

"The court determined the company did not show that HMRC would be no worse off under

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Letter from the Editor

It shows just what strange times we are living in that senior professionals sitting in New York can bemoan the fact that London is 'a lot buzzier at the moment'.

On a trip to New York last month I caught up with a range of restructuring lawyers, financiers and operational turnaround managers. To my surprise, all of them shared one particular message; the post Covid-19 lockdown 'return to the office' has been far slower in the US than in most European capitals they had been to recently.

Many of them mentioned London I think because so many of them have large offices there. They said the contrast was obvious.

And while Mid Town Manhattan seemed quiet to them, many of them pointed out that the problem was much worse on the West Coast, in particular in San Francisco.

Is this a problem? It is if you're an owner or renter of big office buildings in the middle of town. Less so if you're a young entrant to the jobs market whose main experience of work so far has been at home.

The rise of social media means job entrants are far happier working remotely than previous generations. Also, I wonder if the fact that San Francisco has seen the biggest refusal to return to the office suggests the culprit. The Bay Area is famously home to many of the world's leading tech giants. Is it simply a matter of techie people being happier to deal with their laptop at home than pesky humans at the end of a commute?

Whatever the cause, one senior executive was deeply concerned at the implications. How will these remote workers learn to operate in teams, to develop plans together and see them through? Won't they miss the hundred and one unconscious interactions and learning opportunities we have with fellow workers each day in the office?

This senior executive commented: "When I was their age I was desperate to be in the office, to see how the job was done, to learn as much as possible, to make contacts, to get on. They just don't see that. They just keep asking me; 'what are my options?'"

All firms are desperate to attract new talent. Just look at the pay for new legal associates. But when these young people see no great advantage or allure in standing around the water cooler, picking up the flavour of a job by rubbing shoulders with team mates – what to do?

The implications of this aversion to office life are stark; the same senior executives were busy calculating how much office space they should be vacating in the coming years. Real estate businesses are going to need to aggressively repurpose office blocks to deal with this change. It will also strengthen a coming wave of real estate restructurings that professionals are already anticipating on both sides of the Atlantic.

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the plan than in the relevant alternative. It's clear that HMRC will be a more active participant and companies will need to give careful consideration to this when implementing restructuring plans," said Fine.

In this way, GAS shows how RPs are leading the way for more US-style valuation battles. The proposed RP would have prioritised some creditors ahead of HMRC. The judge rejected the RP primarily on the basis that it failed the 'relevant alternative' test.

When the court rejected GAS's RP on 16 May, the company immediately entered a pre-packaged Administration, led by Martyn Pullin and Allan Kelly of FRP.

Kelly said in announcement "GAS had been a profitable, growing business prior to Covid-19 but has been significantly impacted by the pandemic and the subsequent energy market crisis over the last 18 months.

"The directors put forward one of the first Restructuring Plans for an SME [small and medium sized enterprise] trading business to reduce its liabilities to sustainable levels.

"However, the court did not sanction the plan and the directors had no alternative but to seek the appointment of administrators. Regrettably, this also meant all 115 staff were made redundant on appointment. We're now supporting impacted staff and preparing for an asset sale."

The judge declines the GAS Plan

Mr Justice Adam Johnson handed down his 29-page judgment on 16 May. It detailed how there were 15 classes of creditors within the RP and that at 12 of the 15 meetings, the plan achieved 100 per cent support. However, HMRC rejected the RP at one meeting, and at another meeting, two out of three energy suppliers also voted against the plan.

In his judgment, Mr Justice Johnson wrote: "Historically, the operations of the company and the parent company have been successful, on paper at any rate.

"In fact, in August 2019, the parent company returned a dividend to shareholders of roughly UK£19 million.

"Under the plan, the estimated return to HMRC is UK£600,000 - the equivalent of 9.1 pence in the pound, assuming a debt of UK£6.6 million."

> "I consider that HMRC acted rationally in voting against the plan."

"Given its status as a major in the money creditor, and the strong terms in which it has voiced its objection, not only in light of the facts of this particular case but also given its critical public function as the collector of taxes, I think HMRC's views deserve considerable weight.

"The company has not discharged the evidential burden of showing that HMRC would not be any worse off under the plan," the Judge wrote.

An HMRC spokesperson said:

"We are reviewing the findings of the court. We will continue to support customers with tax debts and do everything we can to help those who engage with us to get their tax affairs in order, including offering payment plans."

Court uses discretion in Nasmyth

When it came to considering the earlier RP proposed by Nasymth, a precision engineering company based in Coventry, Mr Justice Leech used a slightly different approach in his own 48-page judgment to decline the Plan.

The Judge ruled that the RP used an improper purpose, to eliminate HMRC debt. Nasmyth owed the taxman almost UK£3 million. For instance, Nasmyth had made no approach to the HMRC to propose an extension or 'time to pay' agreement, a common arrangement with such liabilities.

Once the RP had been rejected, the turnaround investor Rcapital maintained its control of Nasmyth Group anyway by using a pre-packaged Administration. Begbies Traynor, who had previously run an emergency sales process for the business, were appointed Administrators, handing control back to RCapital and saving over 450 jobs in the process.