Neutral Citation Number: [2023] EWHC 1679 (Ch)

Case No: CR-2023-002632

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

7 Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 5 July 2023

Before:

THE HONOURABLE MR JUSTICE RICHARD SMITH

IN THE MATTER OF PREZZO INVESTCO LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Tom Smith KC and **Georgina Peters** of Counsel (instructed by **Greenberg Traurig, LLP**) appeared for the **Company**

Charlotte Cooke of Counsel (instructed by **His Majesty's Revenue and Customs**) appeared as a **Creditor of the Company**

Hearing date: 29 June 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 5 July 2023 by circulation to the parties or their representative by email and by release to the National Archives

Mr Justice Richard Smith:

Introduction

1. Last Friday, I heard a claim by Prezzo Investco Limited (the "**Company**") for sanction of a restructuring plan (the "**Plan**") between the Company and certain of its creditors under sections 901F and 901G of Part 26A of the Companies Act 2006 (the "**Act**"). The Company has a sole, wholly-owned subsidiary, Prezzo Trading Limited ("**Prezzo Trading**"), operator of an Italian casual dining chain under the 'Prezzo' brand name.

2. The claim was supported by three witness statements from Mr Joseph Stelzer, director of the Company, two dated 19 May 2023 and one dated 27 June 2023. HMRC is a substantial creditor of Prezzo, both on a second preferential and an unsecured basis. HMRC opposes the claim. The Revenue's position is supported by the witness statement of Ms Georgia Pope, officer of HMRC, dated 28 June 2023. I received written skeletons and heard oral argument from both the Company and HMRC. At very headline level, HMRC's position is that the Plan would be unfair and should not be sanctioned. The Company, on the other hand, says HMRC's position in opposing sanction is perverse.

The Company

3. The Company has six shareholders, namely CI Milan Ltd, Jampurchaseco Ltd, Silver Cloud Ventures Ltd (of which Mr Stelzer is Managing Director), Antonio Capo, Karen Jones and Dean Challenger. Since incorporation in 2021, the Company has not declared a dividend. The Company's board comprises Jonathan Goldstein, Mr Challenger (CEO), Adam Taylor and Mr Stelzer. Prezzo Trading's board comprises Mr Challenger and the Company. As explained in the Explanatory Statement, Mr Challenger is a shareholder holding Secured Loan Notes of approximately 0.39% in value. Mr Stelzer is director and shareholder of Silver Cloud Ventures Ltd, a shareholder holding Secured Loan Notes of approximately 2.12% in value. Mr Taylor is a director of, and Mr Goldstein is a director of and indirect beneficial shareholder in, Jampurchaseco, the majority shareholder holding secured loan notes of approximately 92.45% in value.

The Company's financial position

4. The Company's unchallenged evidence is that it is in serious financial difficulty, including as a result of the Covid-19 pandemic and, more recently, the impact of price increases. The Company does not enjoy third party financial support and has relied on funding provided under secured loan notes issued by the Company since 10 February 2021 to the majority of its shareholders. That finance has been on-lent to Prezzo Trading under a secured loan agreement dated 10 February 2021. That facility represents Prezzo Trading's sole source of financial support for day to day operations.

5. These financial difficulties originated in 2018, with a CVA being proposed on 23 March 2018 and subsequently implemented by Prezzo Ltd, the original operator of the Prezzo business. That CVA resulted in the sites operated by the Prezzo business being reduced from 300 to 209 and the closure of three other restaurant brands then operated by Prezzo Ltd. Following the CVA, a further 23 sites were closed, reducing the operating restaurants to 186. On 10 February 2021, Prezzo Trading acquired the business and assets of Prezzo

Ltd under a pre-pack administration sale, with the Prezzo Trading loan agreement being concluded to fund the cash consideration.

6. The current financial difficulties resulted in an EBITDA loss of approximately £4.5 million for the 2022 financial year, leading the board of Prezzo Trading to conduct a comprehensive site analysis in September 2022. This analysis concluded that there were 47 loss-making restaurants in the estate, the primary reason for the group's difficult financial position. Despite efforts to market some of these sites or to conclude consensual arrangements with landlords (for the most part, unsuccessfully), the board of the Company concluded on 31 March 2023 that a significant proportion of the restaurants did not operate on a breakeven basis and that the 47 loss-making sites had no real prospect of returning to profitability. The board also identified a capital expenditure requirement of approximately £2 million to maintain the business (before generating any cash). This was in addition to the funding required to meet central overhead costs of the business.

7. On 24 April 2023, Prezzo Trading confirmed publicly that it had closed, and ceased trading from, the 47 loss-making sites, commencing a redundancy process that day, likely resulting in 761 staff redundancies. So far as the group's liquidity position is concerned, Prezzo Trading is insolvent on a cash flow basis and unable to discharge its liabilities. On 19 April 2023, an aggregate amount in respect of PAYE, NIC (employee) liabilities and NIC (employer) liabilities of £1,005,388 became payable to HMRC. On 30 April 2023, a VAT liability of £2,934,514 became payable to HMRC. On 1 May 2023, rent payments became due under the leases of the loss-making sites in an aggregate sum of £1,350,724. Prezzo Trading was unable to discharge any of those sums as well as the further liabilities identified in Mr Stelzer's first witness statement. Prezzo Trading is also coming under increased pressure from a number of local authorities in respect of non-payment of liabilities (including business rates) with various summonses for payment pending in the courts. Finally, the Company itself is also cash flow and balance sheet insolvent. As at 30 June 2023, £24.4m is outstanding under the secured loan notes that it cannot discharge.

8. The Plan seeks to restructure the liabilities of the Company and Prezzo Trading. The 'relevant alternative' to the Plan (within the meaning of section 901G(4) of the Act ("**Relevant Alternative**")) is said to be the administration of both companies. The Plan seeks to avoid that outcome which, it is said by the Company, would be materially worse for most of the creditors and other stakeholders in Prezzo Trading than the Plan. The Plan would allow the business to continue to trade as a going concern, albeit now from a much smaller number of outlets and on a financially sustainable footing. If sanctioned, the Plan would compromise the following categories of liabilities:-

Plan Creditor	**Plan Claim**	**Approximate value as at effective date**
Secured loan noteholders	Amounts outstanding in relation to the secured loan notes	£24,392,844
Deferred and exit consideration holders	The deferred and exit consideration	£3,311,014
Preferential creditor (HMRC)	The secondary preferential claims	£9,927,492

Plan Creditor	**Plan Claim**	**Approximate value as at effective date**
Loss-making site landlords	Liabilities under the loss-making site leases in respect of:- (a) Currently accrued rent and other liabilities (including termination and/or dilapidation costs, service charges, insurance and utility charges); and (b) Future rent and any other liabilities (including termination and/or dilapidation costs, service charges, insurance and utility charges).	£32,193,907
Loss-making site local authorities	The loss-making site business rates and council tax	£1,181,524
Sustainable site local authorities	Sustainable site compromised business rates and council tax	£597,252
CNG Energy	Amounts owing pursuant to the CNG settlement agreement	£232,178
HMRC	Other HMRC claims	£1,887,704
Selecta Coffee	A disputed claim for the provision of services	£51,210
Arval	Unpaid lease amounts and early termination fees under terminated vehicle hire leases	£15,321

9. On 2 May 2023, the Company entered into a deed poll with Prezzo Trading to facilitate the Plan by which the Company assumed all obligations of Prezzo Trading to the Plan creditors on a joint basis. This was undertaken to avoid Prezzo Trading being the Plan proposer, precipitating events of default under various leases (including over the sustainable sites) which could have led to landlords enforcing their rights, so prejudicing the ability of the Prezzo business to continue operating as a going concern.

Secured loan notes

10. The sums due under the secured loan notes are secured by a debenture constituting a fixed and floating charge over the Company's assets. Those assets comprise the Company's shareholding in (the insolvent) Prezzo Trading and the debt due under the Prezzo Trading loan (approximately £16.5m). That loan, in turn, is secured over all Prezzo Trading's assets.

Deferred and exit consideration liabilities

11. Under the 'pre-pack' sale of the business and assets to Prezzo Trading in February 2021, the Company became obliged to discharge certain deferred consideration and exit payment liabilities of CI Milan to the vendors of the business. These comprised a liability of £3m (plus interest) in relation to the deferred consideration (due on 31 December 2023) and an exit fee up to a maximum £5m subject to the achievement of certain financial hurdles on a sale of the Prezzo business. The deferred and exit consideration is also secured by the debenture granted by the Company but is subordinated to the principal amount due under the secured loan notes pursuant to an intercreditor agreement dated 10 February 2021.

Secondary preferential creditor: HMRC

12. Since 19 April 2023, Prezzo Trading has incurred liabilities to HMRC in the sum of approximately £9,927,492, representing PAYE, NIC, VAT and student loan repayments. Such liabilities would rank as a preferential claim in an administration of Prezzo Trading and the Company.

Other creditors: loss-making sites landlords, business rates and council tax

13. The value of the claims due in relation to the loss-making sites, and their treatment under the Plan, will depend on whether the relevant landlords have forfeited their leases, or negotiated a surrender with the Company. As to the 47 loss-making sites closed shortly before the convening hearing, Prezzo Trading has not made the rent payments due on 1 May 2023. The total sum owed to the landlords of such sites is estimated to be £32,193,907. Since the announcement of closure of the loss-making sites on 24 April, nine landlords have agreed surrenders with the Company and six have served forfeiture notices. These landlords will no longer be treated as Plan creditors. The Company is also in the process of trying to agree surrenders with nine other such landlords.

14. Prezzo Trading is also obliged to pay non-domestic rates and council tax to various local authorities for the current rating year which commenced on 1 April 2023. The April 2023 payment was made on its due date but the sites are now closed and Prezzo Trading has ceased paying the remaining instalments. For those loss-making sites where a surrender has not been negotiated with the landlord, the total estimated sum due to the local authorities is £1,181,524. In this regard, the Company says that rates payable in respect of an entire rating year are a contingent liability to which it is subject from the beginning of that year (1 April) in respect of the entire year (see Kaye v South Oxfordshire District Council [2013] EWHC 4165 (Ch) at [55] and, in a CVA context, Lazari Properties 2 Ltd v New Look Retailers Ltd [2021] Bus LR 915. I accept that the same approach would also obtain in the Part 26A context.

Sustainable sites local authorities

15. As to Prezzo Trading's liabilities for non-domestic rates and council tax with respect to the sustainable sites, the May and June 2023 payments overdue to the relevant local authorities are estimated at £597,252.

Excluded liabilities

16. Certain of Prezzo Trading's liabilities, principally trade suppliers, are excluded from the Plan because they are said to relate to premises, services or employees critical to the operation of its restaurants and whose supplies or services may be withdrawn if their claims were to be included. The list of critical suppliers includes food and beverage and non-food restaurant suppliers, utilities, banking, auditor and insurance services, IT, HR, marketing, repairs and maintenance, licensing, expenses and recruitment services.

17. The Group's legal and financial advisors have also been treated as critical and invoices issued by them have been paid in the period since the Plan was launched to ensure it could be proposed and, if sanctioned, implemented.

18. Rental liabilities under the leases for the sustainable sites have not been compromised (in relation to past or future payments). In addition, other liabilities for the sustainable sites such as business rates and council tax liabilities for the period from July 2023 onwards will not be compromised given their importance to the future operation of the restructured business.

19. In his third statement, Mr Stelzer explains why these creditors are critical to the operation of the restaurants. He also explains how the board has concluded that, if goods and services cease being supplied by them, Prezzo Trading would not be able to source alternative providers to supply the necessary goods and services across all sites or how it would be a lengthy process to negotiate new terms, delaying the commencement of those supplies and impacting the ability to operate its restaurants in the meantime. The board therefore concluded that compromising the critical creditors would jeopardise the continuing operation at the sustainable sites.

20. In this regard, the Company says it is well-settled that creditors from whom the ongoing supply of goods or services are viewed by the company as critical to its future ability to trade or the success of the restructuring, or with whom it might be impracticable or undesirable to require them to accept a compromise, can be excluded from the Plan and paid in full (see Re Virgin Active Holdings Ltd [2021] EWHC 814 (Ch) at [261] and Re Houst Ltd [2022] BCC 1143 at [4]).

The Plan

21. Under the Plan, the principal and accrued interest due to the secured loan noteholders will remain whole, albeit the note maturity date will be extended to 10 February 2027 and notice period for the exercise by the majority noteholders of an optional redemption right will be extended to three calendar months. The rationale for their treatment in this way is that they are the senior ranking secured creditors in the group and in the Relevant Alternative to the Plan - said to be administration - the value of the group would be less than the secured debt. As such, they are properly regarded as the group's present economic owners.

22. As for HMRC (as second preferential creditor), upon the sanction of the Plan, HMRC would receive a cash payment equal to the value of the floating charge assets in the Relevant Alternative, less the estimated costs of the administration process. The rationale for this is that HMRC is a preferential creditor but only has recourse to those assets of Prezzo Trading not subject to the fixed charge, namely floating charge assets. As I go on to explain,

following an amendment to the Plan, HMRC would also receive an additional preferential creditor payment of £2m.

23. As for the deferred and exit consideration creditors, all outstanding amounts will be fully written-off and no consideration paid. They are subordinated to the principal amount owing to the secured loan noteholders pursuant to the intercreditor agreement. As a result of their junior ranking, no amount would be payable to them in the Relevant Alternative.

24. Finally, as for the loss-making site landlords and local authorities, sustainable site local authorities and other unsecured creditors, all outstanding amounts would be fully written-off and no consideration paid, the rationale being that they would receive nothing in the Relevant Alternative.

HMRC's treatment under the Plan

25. Given HMRC's opposition, it is appropriate to consider more closely its treatment under the Plan. HMRC was originally proposed to be paid two payments comprising a first payment calculated on the basis that HMRC would receive a return in the Relevant Alternative (administration) equal to the value of the assets subject to the floating charge under the Prezzo Trading debenture (less costs incurred by the administrator in realising floating charge assets). FRP Advisory Trading Limited ("**FRP**") advised the Company that the net value of the floating charge assets would be approximately £1,326,837.

26. A second payment or top up would then have been paid, representing the difference between the amount of the initial payment and the sum which would have been paid to HMRC (if greater) if the value of the floating charge assets had been calculated as at the effective date of the Plan. The top up amount effectively ensures the consideration paid to HMRC reflects the true value of the floating charge assets as at 30 June 2023.

27. Following HMRC's indication at the convening hearing that it would not support the Plan on its then current terms, the Company's legal and financial advisors engaged with HMRC to seek to understand its concerns and the basis on which an improved return to HMRC under the Plan might be made available. The Company then entered into negotiations with the secured loan noteholders with a view to securing additional funding and facilitating a larger payment to HMRC under the Plan. The outcome was that the secured loan noteholders agreed to provide further funding to enable the Company to make an additional payment of £2m to HMRC. Clause 7.4 of the Plan was amended to that end.

28. This additional payment increases the value of the total return to HMRC from £1,326,837 to £3,326,837. Mr Stelzer's evidence is that this was the maximum additional funding the secured loan noteholders were willing to provide, representing their assessment of the benefit to be achieved through the reduced costs of the Plan in comparison with administration. The Company points out that this increases the total return to HMRC under the Plan by 250% compared to the estimated return in the administration, meaning that most, if not all, the restructuring surplus generated by the Plan will be received by HMRC. The Company says this reflects considerable effort to respond to HMRC's concerns and that the additional sum is both a fair offer but also one that represents the best proposal that can be made having regard to the Company's critical financial position.

The Relevant Alternative

29. FRP have considered five possible scenarios likely to occur if the Plan was not to be implemented and two possible scenarios in an administration. In *"Alternative 1"*, the boards of the Company and Prezzo Trading would seek to appoint administrators and implement a *"pre-packaged"* sale of the business and assets to a newly-established entity owned by the secured loan noteholders in return for the release of their debt and security and of the Prezzo Trading loan. In this regard, FRP has itself undertaken a valuation of the Prezzo business (on the basis of *"Alternative 1"*) dated 18 May 2023. This estimates the value as being in the range of £10-14 million as at 30 April 2023. That valuation has not been challenged by HMRC.

30. "*Alternative 2"* is based on a sale to a third party purchaser. However, FRP has concluded that such a sale would not result in a purchase price sufficient to repay the Prezzo Trading loan which would be released under a credit bid by the secured loan noteholders. FRP's analysis has in part been informed by the indicative offers received by the board during certain discussions with third parties between October 2022 and February 2023.

31. So far as the two administration scenarios are concerned, the board of the Company has concluded that Alternative 1 is the most likely outcome and is therefore the Relevant Alternative for purposes of the Plan. Zacaroli J accepted the Company's evidence at the convening hearing that the Relevant Alternative was an insolvent administration. This is not disputed by HMRC. The Company and Prezzo Trading are already insolvent on a cash flow and balance sheet basis. The secured loan notes are in default and the Company considers that the secured loan noteholders would likely demand repayment and enforce their security (as floating chargeholders) to appoint administrators.

32. Since the debt owed to the secured loan noteholders is in the region of £24m, it is clear that the value *"breaks"* in the senior secured debt and that all Plan creditors (HMRC apart) will be *"out of the money"* in the Relevant Alternative.

Estimated outcomes for creditors in the Relevant Alternative

33. FRP has also produced an "Estimated Outcome Statement", estimating outcomes for Plan creditors in the Relevant Alternative of a *"pre-packaged"* administration of the Company and Prezzo Trading and comparing these to the estimated returns under the Plan. This statement was based on financial information provided by the Company, including management's forecast Group balance sheet as at 30 June 2023, as well as a professional valuation of Prezzo Trading's restaurant furniture and kitchen equipment as at 18 April 2023. The statement is also informed by comparable administrations of similar businesses. Based on the statement, the estimated returns to Plan creditors in the Relevant Alternative (*Alternative 1*) and under the Plan are as follows:-

Category of Plan Creditor	**Plan**	**Alternative 1**
Secured loan noteholders	100% of the value of the Secured loan	Under the pre-packaged administration sale, the secured loan noteholders would likely acquire 100% of the equity in the purchaser of business and

Category of Plan Creditor	Plan	Alternative 1
	notes (on amended terms)	assets applicable to the sustainable sites in exchange for the release of the Company's claims against Prezzo Trading under the Prezzo Trading loan.
The Preferential creditor	£3,326,837	£1,326,837
Loss-making site landlords	0 pence in the £	0 pence in the £
Loss-making site local authorities	0 pence in the £	0 pence in the £
Sustainable site local authorities	0 pence in the £	0 pence in the £
Deferred and exit consideration holders	0 pence in the £	0 pence in the £
CNG Energy	0 pence in the £	0 pence in the £
HMRC (in respect of other HMRC claims)	0 pence in the £	0 pence in the £
Selecta Coffee	0 pence in the £	0 pence in the £
Arval	0 pence in the £	0 pence in the £

34. The Company therefore says that:-

(i) no Plan creditor will be worse off under the Plan than in administration;

(ii) HMRC will be significantly better off under the Plan than in administration; and

(iii) the treatment of secured loan noteholders (whose claims will not be compromised but will be amended as indicated) reflects the value *"break"* in their debt.

35. Following implementation of the Plan, the current shareholders will remain as such, with no variation to their rights and equity participation. Given that the value breaks in the senior secured debt in the Relevant Alternative, the Company says that the secured loan noteholders (who coincide with the shareholders save for CI Milan Ltd) are to be regarded as the economic owner of the business (see Re Virgin Active Holdings Ltd at [242], [249] and [266]-[267]).

36. The Company points out that the secured loan noteholders and shareholders have made substantial contributions in the form of:-

(i) £1.4 million of interim emergency funding to enable the Prezzo business to continue trading pending the implementation of the Plan;

(ii) an additional £2 million for the additional payment to HMRC; and

(iii) the majority shareholder in the Company and majority holder of the secured loan notes, Jampurchaseco, undertaking to the Company and Prezzo Trading to pay any shortfall in consideration to be paid to HMRC (in respect of its preferential claims) if the Company or Prezzo Trading do not have sufficient cash resources to pay the amount in full on the due date.

37. Finally, the FRP Valuation shows that the current equity value of the business is nil.

The Plan – jurisdiction

38. Following that exposition of the background, proposed Plan and indicated outcomes, I now turn to the sanction application, as to which, the following jurisdictional issues were determined by Zacaroli J at the convening hearing, namely that:-

(i) the Company, being incorporated in England and Wales, is a *"company"* as defined by section 901A of the 2006 Act. The Company says that there are no broader foreign elements to the Plan requiring closer consideration of jurisdictional connection. Although there are two Scots law governed leases over two Scottish loss-making sites, the advice received by the Company is that the Plan will be effective in Scotland;

(ii) 'Conditions A and B', being the two jurisdictional requirements prescribed by section 901A relating to a company's financial position, were satisfied; and

(iii) there were no jurisdictional 'roadblocks' which might cause the court to refuse to sanction the Plan, subject to one issue discussed below.

39. HMRC also submitted at the convening hearing that it had not received sufficient notice of the Plan, there having been a period of 19 days between the circulation of the Practice Statement Letter (on 2 May 2023) and the convening hearing. Prior to the convening hearing, the Company agreed with HMRC that it would be permitted to raise any issues as to jurisdiction or class (or other issues usually raised at the convening stage) at the sanction hearing. This was recorded in paragraph 13 of the convening order which entitled any Plan creditors to raise issues under paragraph 6 of the Practice Statement dated 26 June 2020. In the event, HMRC did not raise any such issues at the sanction hearing, nor did any other creditor attend to make representations.

40. At the convening hearing, the Company identified a potential jurisdictional issue in relation to the treatment of two classes of Plan creditors, namely (i) the other creditors and (ii) sustainable site local authorities. Both classes will receive a nil distribution under the Plan because they would be *"out of the money"* by some considerable margin in the Relevant Alternative given the amount of the secured loan notes compared to the value of the Prezzo

business. This gives rise to the question whether there is nonetheless some requirement to give consideration to these creditors. That issue was stood over to the sanction hearing.

41. Section 901A sets out two jurisdictional requirements relating to a company's financial position, namely:-

    (i) 'Condition A' (section 901A(2)) that "*the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern*"; and

    (ii) 'Condition B' (section 901A(3)) that "*(a) a compromise or arrangement is proposed between the company and (i) its creditors, or any class of them ... and (b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2)*".

42. Condition A, and the *second* limb of Condition B, requires the court to consider the *"financial difficulties"* suffered by the plan company. Those requirements were found to have been satisfied by Zacaroli J at the convening hearing. However, the *first* limb of Condition B requires that the proposed plan be a *"compromise or arrangement"*. As to this, the authorities indicate that:-

    (i) the same concept of *"compromise or arrangement"* in relation to Part 26 schemes has, to some extent, been applied to restructuring plans under Part 26A of the Act (see <u>Re Gategroup Guarantee Ltd</u> [2021] BCC 549 at [142]);

    (ii) as with schemes, the word *"arrangement"* is to be construed broadly (see <u>Re Virgin Atlantic Airways Ltd</u> at [38]); and

    (iii) in the Part 26 scheme context, it has traditionally been interpreted as requiring some element of *"give and take"* between the company and the scheme creditors (see <u>Re NFU Development</u> [1972] 1 WLR 1548 at 1554A, referring to <u>In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.</u> [1981] 1 Ch 213,243), the courts having " *... deliberately avoided giving the word a narrow meaning beyond indicating that it cannot amount simply to a surrender or confiscation"* (see <u>Re Lehman Brothers International (Europe) (No 2)</u> [2019] Bus LR 489, at [45]).

43. The question arises whether the "give and take" requirement applies in relation to a Part 26A plan in respect of creditors who are *"out of the money"* in the Relevant Alternative, specifically whether an "*arrangement*" encompasses creditors not required to be given any valuable compensation for the release or cancellation of their rights under the plan, there being no *"take"* by those plan creditors. The point was considered in <u>Re Smile Telecoms Holdings Limited</u> [2023] 1 BCLC 352 and <u>Re GAS Co. Limited</u> [2023] EWHC 1026 (Ch) (convening hearing), albeit neither court ultimately needed to decide it. I accept the Company's submission that, in the context of a Part 26A restructuring plan, the concept of an "*arrangement*" cannot require some form of consideration to be provided to "*out of the money*" creditors. As Mr Smith KC submitted, Part 26A provides for the sanction of a plan *against* the dissenting vote of a creditor class under the Court's 'cram-down' jurisdiction in section 901G of the Act. Since the related statutory condition is that such a class should be *"no worse off"* than if the plan had not been sanctioned, if it would receive nothing in the

alternative scenario, it follows that the Act envisages the compromise of their claims under a plan under which they would also receive nothing.

The Plan meetings

44. Having considered the Chairperson's Report and Mr Stelzer's third witness statement, I am satisfied that the Plan meetings were convened in the manner directed in the convening order. As to the outcome of those meetings, the Plan:-

(i) was approved by the requisite majority (over 75% in value) of those voting at two of the Plan meetings by:-

(a) 100% of the secured loan noteholders voting in favour of the Plan; and
(b) 80% by value of the sustainable site local authorities present and voting at the sustainable sites local authorities meeting voting in favour and 20% voting against the Plan, representing two creditors voting in favour and one against the Plan.

(ii) was not approved at two of the Plan Meetings by:-

(a) HMRC (being the preferential creditor); and
(b) 82% by value of the other creditors present (virtually) and voting at the other creditors meeting voting against and 18% voting in favour of the Plan, representing 2 creditors voting in favour and 9 voting against the Plan.

45. Based on the Chairman's Report, the turnout in each class was as follows:-

Creditor class	**%age in value of Plan creditors present and voting at the Plan meeting**	**%age in number of Plan creditors present and voting at the Plan meeting**	**Approved / Not Approved**
Secured loan noteholders	100%	100%	Approved
Preferential creditor	100%	100%	Not Approved
Other creditors	33%	13%	Not Approved
Sustainable sites local authorities	14%	7%	Approved

The sanction application

46. Section 901F of the Act provides relevantly as follows:-

"(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

(2) Subsection (1) is subject to … section 901G …".

47. Section 901G empowers the Court to exercise its jurisdiction to sanction a plan under section 901F even though the plan has not been approved by the requisite majority in each meeting of creditors. Although the term is not used in the statute, the jurisdiction has become known as a *"cross-class cram-down"*. This provides relevantly that:-

> *"(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.*
>
> *(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F".*

48. These statutory conditions are prescribed by sections 901G(3) and (5):-

> *"(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).*
>
> *(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative".*

49. The *"relevant alternative"* is defined by section 901G(4):-

> *"(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F".*

50. Section 901G therefore empowers the court to sanction a restructuring plan under section 901F, even though the plan has not been approved by the requisite majority in each meeting of creditors provided that (i) an assenting class has *"a genuine economic interest in the company, in the event of the relevant alternative"* and (ii) the court concludes that none of the members of the dissenting class(es) would be *"any worse off"* than in the relevant alternative. Given the two creditor classes that did not approve the Plan by the requisite majority, the Company seeks the Court's exercise of the section 901G cram-down power.

Legal principles

51. As to the legal principles that apply to the sanction of every plan under Part 26A (or scheme under Part 26), the conventional approach comprises the four stages in Re KCA Deutag UK Finance plc [2020] EWHC 2977 (Ch) at [16], as stated in the following terms:-

> *"The relevant questions for the court at the sanction hearing can therefore be summarised as follows:*
>
> *i) Has there been compliance with the statutory requirements?*
>
> *ii) Was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the class meeting?*
>
> *iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?*
>
> *iv) Is there some other "blot" or defect in the scheme?"*

52. The requirement for compliance with the applicable provisions of the statute was explained in Re KCA Deutag UK Finance plc [2020] EWHC 2977 (Ch), at [18] as comprising the following elements:-

    > *"(i) have the classes been properly constituted; (ii) was there compliance with the terms of the convening order (including in particular whether the scheme creditors received an adequate explanatory statement); and (iii) were the statutory majorities obtained?"*

53. In Re Amicus Finance plc (in administration) [2022] Bus LR 86, Sir Alastair Norris described the requirement for the Explanatory Statement (at [37(a)]) as whether sufficient information was provided "*to enable the creditors to make an informed decision whether to accept the risks inherent in the scheme in place of the risks inherent in a liquidation.*"

54. I am satisfied that the statutory requirements were met in this case. The reasons why the four classes were correctly constituted were accepted by Zacaroli J at the convening hearing. As noted, the requisite majorities were obtained at the Plan meetings of the approving creditors. Having reviewed the Explanatory and Supplemental Statements, I am also satisfied that the explanation of the Plan was more than adequate. As for the requirement for fair representation, there was a full turnout at the meetings of secured loan noteholders and preferential creditor (HMRC). Turnout at the sustainable sites local authorities meeting was lower, being 14% by value and 7% in number. Turnout at the meeting of other creditors, a dissenting class, was 33% by value and 13% in number. I agree that these lower turnouts are unsurprising, representing (as they do) creditors who would be out of the money and have no real economic interest in the Relevant Alternative (see in Re Listrac Midco Ltd [2023] EWHC 460 at [63]-[64]). I accept that this explains their passivity. I also accept that there is nothing to suggest that the secured loan noteholders or sustainable site local authorities were motivated other than by *bona fide* commercial interests and in accordance with the interests of the class. As such, there was fair representation at each of the four meetings.

55. In Re KCA Deutag, Snowden J observed that 'fairness' in this context *"has a specific and limited meaning"* to the following end (at [28]):-

> *"... The court simply has to be satisfied that the scheme is one that an intelligent and honest man, acting in respect of his interests, might reasonably approve. It does not mean that the court is required to form a view of whether the scheme is, in some general sense, or even in the court's own opinion, the 'fairest' or 'best' scheme".*

56. I am also satisfied that the Plan is one that an intelligent and honest man, acting in his own interests, *might* reasonably approve. I say that because it results in all classes of Plan creditor either being (in the case of secured loan noteholders and HMRC) materially better off than, or (in the case of sustainable site local authorities and other creditors) at least on a par with, the result likely to be achieved in the Relevant Alternative as I explain later. Finally, no 'blot' or defect in the Plan has been identified.

Cross-class 'cram-down' under Section 901G

57. Where the Court is asked to sanction a plan in reliance on the cross-class cram-down power, there are three questions the Court must consider (Re Virgin Active Holdings Ltd at [104]; Re Houst Ltd at [13]):-

    (i) **Condition A**: If the restructuring plan is sanctioned, would any members of the dissenting class be any worse off than they would be in the event of the relevant alternative?

    (ii) **Condition B**: Has the plan been approved by 75% of those voting in any class that would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative?

    (iii) **Discretion**: In all the circumstances, should the Court exercise its discretion to sanction the restructuring plan?

58. HMRC accept that Conditions A and B are satisfied and that I have jurisdiction to sanction the Plan. HMRC's objection turns on the exercise of my discretion. However, I must satisfy myself as to both aspects.

Condition A: the *"no worse off"* test

59. In Re Virgin Active Holdings at [106], Snowden J described a three-step process for considering the 'no worse off' test, namely (i) identifying what would be most likely to occur in relation to the plan companies if the plan is not sanctioned (ii) determining the consequences of that for the members of the dissenting classes (primarily, but not exclusively, in terms of the anticipated returns on their claims) and (iii) comparing those consequences with those for the members of the dissenting classes if the plans are sanctioned. Snowden J also explained (at [107]) that the concept of what is "*most likely to occur*" does not require the court to satisfy itself that a particular alternative would definitely occur or that a particular alternative outcome is more likely than not to occur. If there are multiple alternatives, the court is required only to select the one that is more likely to occur than the others. In identifying the relevant alternative, the company directors are normally in the best position to identify what will happen if a scheme or plan fails (see, for

example, Re Steinhoff International Holdings NV [2021] EWHC 184 (Ch) at [134]- [135]; Re ED&F Man Holdings Ltd [2022] EWHC 687 (Ch) at [39]; Re AGPS Bondco Plc [2023] EWHC 916 (Ch) at [61]-[62]).

60. As to the second step, the outcome for the dissenting creditors is to be assessed primarily, but not exclusively, by reference to the anticipated returns on their claims (see Re Virgin Active at [106]; Re DeepOcean 1 UK Ltd [2021] BCC 483at [35]). In Re Deep Ocean, Trower J identified matters such as timing of distribution and security of any covenant to pay as examples of other incidents of the liability to the creditor concerned, of which account may need to be taken when deciding whether the creditor is no worse off under the plan. Snowden J also described (at [108]) the estimated outcomes analysis as a familiar, but inherently uncertain, exercise given the contingencies and assumptions involved.

The Relevant Alternative in this case

61. As to the Relevant Alternative in this case, I accept the evidence which identifies as the most likely outcome the pre-pack administration sale of the business and assets to a newly established entity owned by the secured loan noteholders. I also accept the analysis to which I have already referred of the estimated outcomes for creditors in the Relevant Alternative, as compared with the estimated recoveries under the Plan. That analysis confirms that the recoveries for the other creditors are no worse under the Plan than in the Relevant Alternative, their returns under both being nil value or, in the case of HMRC (as preferential creditor), significantly better. The "no worse off" test (Condition A) under section 901G is accordingly satisfied.

Condition B: the *"genuine economic interest"* test

62. The second statutory condition requires the Court to consider whether the Plan has been approved by 75% of those present and voting in any class that would receive a payment or have a genuine economic interest in the company in the event of the Relevant Alternative. The expression *"genuine economic interest"* can be answered by identifying whether the creditors would be *"in the money"* in the Relevant Alternative (see, for example, Re Virgin Active Holdings Ltd at [247]-[249]). In this case, it is clear that the 'genuine economic interest test' (Condition B) is met. The Plan has been approved unanimously by the class of creditors comprised by the secured loan noteholders who would receive payment in the Relevant Alternative.

63. As such, I am satisfied that I have jurisdiction to sanction a 'cross-class cram-down'. I now turn to the question of the exercise of my discretion under section 901G of the Act.

Discretion: relevant legal principles

64. As a preliminary matter, I accept HMRC's submission that there is no presumption that the cross-class cram-down power will be exercised merely because Conditions A and B in section 901G are satisfied (see Re Virgin Active at [218] and [223]; Re ED&F Man at [48]; Re AGPS BondCo at [65]; Re Nasmyth [2023] EWHC 988 (Ch) at [95]).

65. Although the conventional approach to discretion under Part 26 schemes will remain *"relevant",* there are differences as to how these principles are applied under Part 26A. Most obviously, the principle that the Court will ordinarily be *"slow to differ"* from the

views of creditors as expressed at the class meeting, applied in Part 26 schemes, is inapt in the case of cross-class cram-down under section 901G, at least in relation to any dissenting classes (see Re DeepOcean at [45]-[46]; Re Virgin Active at [214], Re Hurricane Energy [2022] 1 BCLC 36 at [40]; Re Houst Ltd at [24]-[26]).

66. As to the matters that fall to be considered, Snowden J observed in Re Virgin Active (at [213]) that "*Section 901G contains no express test or identification of any factors that should be taken into account, and leaves matters entirely at large*."

67. HMRC also point to the Explanatory Note to the Corporate Governance and Insolvency Act 2020 which states that "[a]*s is the case with Part 26 schemes, the court will always have absolute discretion over whether to sanction a restructuring plan. For example, even if the conditions of cross class cram down are met, the court may refuse to sanction a restructuring plan on the basis it is not just and equitable*." However, as HMRC also point out, Snowden J held in Re Virgin Active (at [219]-[221]) that it is not the case that a plan will be sanctioned unless the Court thinks it is not "*just and equitable*" and these words should not be read into section 901G or treated as a statutory test.

68. The authorities also indicate certain factors that may be relevant to the exercise of discretion, including:-

(i) where creditors would receive no payment or have no economic interest in the company in the event of the relevant alternative, little or no weight is to be paid to their views (see Re Virgin Active Holdings Ltd at [266]; Re Houst Ltd at [27]; Re GAS Co. Ltd [2023] EWHC 1141 (Ch) at [110]);

(ii) the level of overall support for the plan is relevant, although not decisive (Re DeepOcean at [53]-[61]; Re Virgin Active at [259]-[300]; Re AGPS Bondco Plc at [66] to [67]);

(iii) whether the plan provides for a fair distribution of the benefits of the restructuring is relevant to the exercise of discretion (see, for example Re Virgin Active at [256]-[300]; Re Houst Ltd at [29]). The Revenue place particular emphasis on this factor;

(iv) when considering if a plan fairly allocates value between the different creditor classes, it is relevant to consider whether the priority as between them in the Relevant Alternative is reflected in the distributions under the plan, albeit a departure from that priority is not in itself fatal to sanction (Re Houst Ltd at [30]);

(v) the *source* of the benefits to be received under the restructuring, for example, whether from assets of the plan company or third parties willing to support the restructuring, will also be a relevant factor (see Re DeepOcean at [64]; Re Houst Ltd at [31]); and

(vi) creditor non-opposition to sanction will be a relevant factor for the Court to take into account in the exercise of its discretion (see Re ED&F Man at [39]; Re Houst at [42]).

69. HMRC also relies on *dicta* from different authorities in which HMRC's role as creditor has been specifically considered, including, for example:-

(i) HMRC being a creditor whose "*views deserve considerable weight*" (Re GAS Co. Ltd at [138]);

(ii) the need for the court *to* "*exercise caution in relation to HMRC debts*" (Re Nasmyth at [115]);

(iii) the need to scrutinise a plan with care and not cram down HMRC "*unless there are good reasons to do so*" (Re Nasmyth at [116]); and

(iv) the risk of sanction giving a "*green light*" to companies to use plans to cram down their unpaid tax bills and, where a company has been trading at the expense of HMRC, as an "*instrument of abuse*" (Re Nasmyth at [116]).

70. HMRC also notes from Re Nasmyth (at [117]-[119]) the significance the court attached to size of the HMRC debt (including at group level), its age, its secondary preferential status, the relevant company's failure to agree a time to pay arrangement with HMRC and that its directors could reasonably have formed the view that HMRC should be treated as a critical trade creditor. By contrast, the Company emphasises the very different circumstances in which the HMRC debt arose in that case as well as the following further observations:-

(i) "*the Court should not refuse to sanction a restructuring plan under Part 26A as a matter of principle because HMRC will be crammed down if the plan is sanctioned*" (at [114]); and

(ii) HMRC debts do not constitute trust monies and HMRC should not be treated as if it were a secured creditor (at [113]).

The alleged unfair treatment of HMRC under the Plan

71. In this case, HMRC relies upon various matters to invite the court to decline the exercise of its discretion to sanction the Plan, including:-

(i) The size of the HMRC debt proposed to be compromised (£11,815,196), being a matter recognised in Re Nasmyth as relevant to the court's discretion;

(ii) £9,927,492 of that debt having secondary preferential status, that status also said to be an important factor in considering the exercise of the cram-down power;

(iii) The failure of the Company or Prezzo Trading to make any payments to HMRC (aside from a £200 penalty) from 31st March to June 2023 when the Company was preparing and proposing the Plan despite deducting PAYE and NIC on behalf of its employees and collecting monies from third parties in respect of VAT;

(iv) During that period, Prezzo Trading had, however, continued to trade and made substantial payments to creditors deemed to be "*critical*". HMRC says it appears they were paid approximately £4.9 million each month whilst the Plan was being proposed. Unlike HMRC, such creditors are paid 100p in the £;

(v) The Company is therefore essentially trading to the detriment of HMRC, the ongoing business being funded by the collection of monies that should have (but have not) been paid over to HMRC. The Plan now proposes the compromise of those HMRC debts. The court should not sanction this non-payment of tax and give the "*green light*" to companies to use Part 26A in this way;

(vi) Where a restructuring plan is being proposed, the payment of at least those taxes that rank as secondary preferential should be considered "critical". To conclude otherwise fails to recognise sufficiently the rationale for debts having been afforded that status and HMRC's status as an "involuntary" creditor (that cannot use the threat of withdrawing services to ensure payment);

(vii) In Re Nasmyth, Leech J (at [119(1)]) was "*satisfied that the directors of the Company could reasonably have taken the view that it was in its commercial interests to treat HMRC as an essential or critical creditor*";

(viii) Although the Company might seek to suggest that there were insufficient funds to pay HMRC during this period:-

(a) No real explanation has been provided as to why, following closure of the loss-making sites in April 2023, HMRC has not been paid in full (or something at least), raising a question as to whether this is a cynical attempt to avoid liabilities to HMRC or, if not, as to the viability of Prezzo's business model; and

(b) If these debts could not be paid, the appropriate response is not to cram down HMRC but for the Company to have proposed a restructuring plan sooner, before these liabilities to HMRC were incurred.

(ix) The proposed distribution of the restructuring surplus also supports the view that HMRC's treatment under the Plan is unfair, whether because HMRC should have been treated as critical creditor or because its contribution to the benefits of the restructuring has not been sufficiently recognised.

(x) The restructuring surplus arises from (a) the continued trading of the Company and (b) the reduction of its balance sheet. HMRC's preferential debts have already been used to fund the former (and the Plan proposal). As to the latter, under the Plan, HMRC would contribute to the Company's future success by giving up over 71% of what it will be owed (£8,488,359);

(xi) Despite HMRC's contribution to the surplus, the Plan as initially proposed after the convening hearing provided for HMRC to receive only what it would in the Relevant Alternative (from a pot to which HMRC has contributed far more), revealing the Company's attitude that HMRC's interests were of little significance;

(xii) Although the Plan now includes provision for HMRC to be paid an additional preferential creditor payment (£2m), that sum is dwarfed by the secondary preferential element of HMRC's debt alone;

(xiii) The secured loan noteholders will remain whole (both as to principal and interest), albeit with extended maturity dates. Subject to Jampurchaseco's undertaking to pay any consideration shortfall to HMRC, the only 'new' money from secured loan noteholders is the additional £2m payment. That is not substantial additional risk;

(xiv) The Company's position is that the secured loan noteholders will be paid in full. They will also retain their shares (and therefore the upside of future profits);

(xv) The Company has failed to submit its Corporation Tax return due on 31 December 2022, it has failed to make any 'time to pay' proposal and the Company is unlikely to enjoy forbearance in the future and HMRC may seek security; and

(xvi) The sanction of the Plan would have implications beyond this case for the unfair avoidance of HMRC debts and the risk of Part 26A being used abusively.

72. I explored with HMRC in oral submission what it was suggested the Company should have done differently while the Plan was being prepared were I to accept that there were insufficient funds to pay HMRC during that period. HMRC's response was that the Plan should have been proposed sooner such that the Company would not be trading at HMRC's expense, alternatively the Company should have put forward a proposal involving HMRC's debt being paid in the future and/ or receiving a larger sum under the Plan.

73. I also discerned from its submissions that HMRC were approaching this case on the basis of a point of principle and enquired whether it was being contended that HMRC's preferential debts should in all cases have to be paid during the period of preparation of a restructuring plan before the court entertains sanction. Although it appeared to admit of the possibility of cases based on different facts in which sanction might be appropriate, it seemed to me that HMRC was in effect so contending.

Discussion

74. Having considered carefully the evidence and the parties' submissions, I am firmly of the view that I should sanction the Plan, including the 'cram-down' of the HMRC debt it contemplates. As a preliminary matter, for the reasons given, I am satisfied that I have jurisdiction, both at the general level and under section 901G specifically, to make that order. HMRC accepts this.

75. As for the exercise of my discretion, to the extent it was being suggested that the court should not, as a matter of principle, entertain sanction without the discharge of, or proper provision for, HMRC preferential liabilities incurred during the Plan process, there is no warrant for me to make such a finding. In my view, that would be an inappropriate fetter on the power afforded by Part 26A which, on its terms, admits of the possibility of the 'cram-down' of such debts. Rather, the proper course (as it was in the other cases to which I have been referred) is to consider the claim for sanction taking into account the relevant factors indicated by the authorities in the context of the particular facts and circumstances of the case.

76. As to the circumstances of this case, I accept that little or no weight should be paid to the votes of the 'out of the money' creditors. Moreover, those other creditors not being entitled to share in any restructuring surplus, I also accept that there is no basis for them to complain about the allocation of benefits of the Plan. The position of HMRC is, of course, different since it is 'in the money' in the Relevant Alternative as a result of its preferential status in administration. I also pay due regard to the fact that HMRC has objected to the Plan, and done so in strong terms, the fact that it is an involuntary creditor and the need for caution generally in considering the 'cram-down' of HMRC debts, as well as the preferential status afforded to the majority of those debts. Having done so, I am nevertheless satisfied that the allocation of benefits under the Plan is fair.

77. The secured loan noteholders will ultimately be paid under the Plan 100% of the value of their secured loan notes. As fixed charge security holders, their claims would rank in priority to any other claim of the Plan creditors in administration. The Plan therefore reflects the priority in which they would be paid in the Relevant Alternative relative to other Plan creditors. HMRC is not a secured creditor. In an administration, it would be paid £1,326,837. Under the Plan, HMRC will be paid a compromised sum of at least £3,326,837. As such, there is no departure under the Plan from the order of priority in which HMRC would (relative to the sustainable site local authorities and other creditors) be paid a distribution in the Relevant Alternative.

78. The payment to be provided to HMRC under the Plan means it will receive most, if not all, of the "*restructuring surplus*" generated by the Plan. In that regard, I accept the evidence that the secured loan noteholders have estimated at £2m the saving of costs which would otherwise be incurred in an administration. That estimate accords approximately with the Company's own assessment (£2.4m). I also accept that the secured loan noteholders are not willing to pay more than £2m, being the point at which it becomes uneconomic to pursue the Plan rather than administration.

79. I have also considered carefully in this context those authorities in which HMRC 'cram-down' has been considered, albeit recognising the multiple and often countervailing considerations in play in those cases and their very different facts from this one. So, for example, in Re Nasmyth, although HMRC's preferential debt was much lower than in this case (£209,703), the relevant corporate group owed a larger aggregate debt (approximately £2.6m), some of which had accrued over a much longer period. In this case, HMRC's debt relates to a much shorter and more recent period (April to June 2023).

80. Also significant in Re Nasmyth was that HMRC had in place from February 2022 time to pay agreements for the tax debt of the corporate group, an arrangement that went into default from August 2022. Against that background, the relevant company's failure to conclude further such agreements prior to plan launch was considered to *"tip the balance"* against sanction. In this case, there were no such agreements. Moreover, the proposed distribution to HMRC in Re Nasmyth was only 4.8p in the £, described as "*tiny*" in both absolute and relative terms compared to the distribution to be made to one of the secured creditors. In this case, HMRC will be paid a return of 33.5p in the £ within 30 days of the Plan's effective date.

81. Likewise, the facts of Re GAS Co. Ltd were materially different from this case, including the history of (broken) time to pay agreements compared to the much shorter and more recent period of the preferential debts to be compromised under the Plan. Moreover, the proposed return to HMRC in that other case was again low (9.1p to the £) and would not be paid in full until after two years.

82. Although the parties differed in their views as to the extent and timing of engagement by the Company with HMRC concerning the Plan, having considered the evidence and seen the underlying written communications, I am satisfied that the former has meaningfully and promptly communicated with the latter, including in the provision of extensive information with a view to addressing HMRC's concerns about the Plan. Moreover, having considered HMRC's concerns, the Company also took positive steps to engage with the secured loan noteholders to procure a significant improvement in HMRC's position under the Plan compared to administration. At the hearing, I enquired whether, in light of the concerns expressed by HMRC, it had sought to engage in negotiation with the Company concerning the Plan. HMRC confirmed it had not.

83. As for HMRC's main point that the Company has used its debts due to HMRC to fund the business since March 2023 while the Plan was being pursued, Mr Stelzer's evidence is that, from the commencement of the Plan process in April 2023, the Company has lacked sufficient funding to pay all its creditors in full. In addition to that evidence, HMRC also received extensive financial information from the Company to assist in its evaluation of the Plan. If, notwithstanding that evidence and information, HMRC considered the Company had been able to pay HMRC's preferential debt (in whole or part), it could have cross-examined Mr Stelzer about it. It did not avail itself of that opportunity. I accept Mr Stelzer's evidence. I also accept that, in these circumstances, a time to pay arrangement would not have been feasible.

84. Having considered Mr Stelzer's evidence and the related documents, I also accept that those creditors the Company continued to pay (and proposes to exclude from the Plan) were (and remain) critical to the preservation of its business and ability to trade. In this regard, although HMRC went unpaid, so too did a number of other non-critical creditors, including significantly, the landlords of the loss-making sites, whose indebtedness extends to more than £32m. HMRC accepts that it may be necessary to pay "critical creditors" to preserve value and rescue a company's business as a going concern. I accept that the course undertaken by the Company and Prezzo Trading in this case was appropriate in the interests of creditors.

85. I also accept that the secured loan noteholders have caused emergency interim funding of £1.4m to be provided to enable the Prezzo business to continue trading during the period of the Plan process.

86. Although HMRC asserted that the Plan process could have been commenced earlier, I am unable to conclude on the evidence that the Company did not act with appropriate expedition. Again, HMRC did not seek to cross-examine Mr Stelzer about this.

87. Although HMRC's evidence suggested it had lost tax from the Prezzo business to the tune of some £18.5m since February 2021, the administration then was of a different company, the shareholders of which were 'wiped out' as a result. According to the Company, the

secured loan noteholders have provided new investment of nearly £10.7m, with over £43m of tax having since been paid to HMRC. I accept this.

88. I have borne in mind what HMRC said about its possible future approach to the Company, including taking security.

89. I accept the Company's explanation for its failure to file its Corporation Tax return, namely its inability to pay its tax advisers. Although not an excuse, and a penalty has rightly been imposed, this rather underscores the Company's inability to pay its debts and its focused prioritisation of critical trade creditors.

90. HMRC does not contest that the alternative if the Plan is not sanctioned is administration, FRP's estimate of HMRC's likely return in that administration and that HMRC's return under the Plan will be significantly higher. The alternative of administration will be a costly and value destroying process. The cost of that process can be avoided under the Plan and the saving enure instead to HMRC and, therefore, the taxpayer. HMRC accepts that this is a relevant consideration in the exercise of my discretion. I agree.

91. Having approached this matter with appropriate circumspection, I am satisfied in all the circumstances of this case that the Plan is a fair one, that the Company has not been trading "*at the expense of*" HMRC, let alone cynically so as HMRC canvassed that possibility in submission, and that the directors of the Company and Prezzo Trading could reasonably have formed the view here that HMRC should not be treated as a "critical" creditor. More broadly, I am also satisfied that the Plan is not being used by the Company as an 'instrument of abuse' and that its sanction here will not give a 'green light' to companies to use Part 26A to 'cram down' their unpaid tax bills, a risk to which the court is, of course, astute.

92. I am firmly of the view that the Plan should be sanctioned. I so order.