Part 26A Restructuring Plans
Reflections and next steps

Adapt. Transform. Succeed.

Introduction

The Institute for Turnaround ("The IFT") believes that Part 26A Restructuring Plans ("Restructuring Plans") are a very useful restructuring tool for companies suffering from financial distress, and can benefit the economy and wider stakeholders, with the opportunity to help drive improved future financial performance to avoid unnecessary insolvencies.

In a substantial programme of work, The IFT is seeking to raise awareness of Restructuring Plans, support their use across all sizes and types of business where appropriate, and promote the development of practice. In particular, we would like to see this tool be accessible for smaller companies as a means of saving jobs and preserving economic value across the UK.

As part of this work, The IFT conducted a series of regional roundtable meetings in February and March 2024, bringing together IFT independent members, lenders, alternative lenders, investors, lawyers, advisers and statutory and other key stakeholders.

The purpose of the roundtables included:

- To investigate a mixture of experiences with and views on Restructuring Plans.
- To discuss the ingredients for successful Restructuring Plans.
- To provide information on and engage IFT members and other market practitioners and stakeholders with Restructuring Plans as an emerging company improvement process.

The roundtable discussions were supplemented with a follow-up survey aimed at gathering further information on the use of Restructuring Plans. This report summarises the key findings from the roundtables, and the results of the associated survey are published alongside the report.

This is part of an ongoing programme of activity, with some of the next steps identified within this report.

We welcome further engagement and views from stakeholders to progress this activity.

Milly Camley, CEO, The IFT

Nick Edwards, IFT Board Member and Restructuring Plans Programme Sponsor

The Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 received Royal Assent in June 2020. The Act included temporary measures to support businesses through the impacts of the Covid-19 pandemic as well as three new permanent measures: a new standalone company moratorium, suspension of termination (ipso facto) clauses and Restructuring Plans. These measures represented the introduction of a new framework with a globally comparable "debtor in possession" model in order to improve the UK's World Bank rating and competitiveness as a restructuring jurisdiction.

All three measures represent fixed company law measures to help businesses in financial distress to explore the options available to them. In particular, Restructuring Plans are a flexible and company-led tool to allow ultimately viable businesses to accomplish a balance sheet reset where they may be experiencing financial difficulties due to successive global and economic pressures.

Restructuring Plans were initially pioneered in relation to companies such as Virgin Atlantic, combining innovative company law with the UK's world-leading restructuring expertise and legal system. Restructuring Plans were envisaged to provide the opportunity to save jobs and enterprise value for both large and smaller companies. Indeed, they have been used successfully by businesses in a range of sectors including by smaller and mid-market companies, for example, *Re Amicus Finance plc* (in administration) [2021] EWHC 3036 (Ch), and *Re Houst Limited* [2022] EWHC 1941 (Ch). It is also worth noting that as practice has developed, foreign entities have sought out these UK processes due to the certainty provided, access to high quality commercial advice and the excellence of the UK legal system and judiciary.

The IFT is strongly supportive of the potential for Restructuring Plans to benefit companies, the economy and wider stakeholders. They have the potential to encourage improved future financial performance, an approach that can be facilitated or supported by IFT members.

Key Findings

- There is now significant case law in relation to Restructuring Plans, encompassing companies of a range of sizes and across different sectors. The recent Court of Appeal judgment in *Re AGPS Bondco plc* [2024] EWCA Civ 24 (known as the Adler case) provides a welcome early clarification on case law to date, providing tramlines for future practice, a steer on communication and clarity on issues such as adherence to *pari passu* principles. Given this maturing position, a Restructuring Plan should always be considered as an option for companies experiencing or close to financial difficulty.

- Case law and the Adler judgement provide a guide to the type of companies whose circumstances make them most amenable to a Restructuring Plan.

- The value of Restructuring Plans against costs came across very clearly in our engagement. Whilst currently the process can be expected to be more expensive than a CVA, through the cross-class cram down it has the potential to be more powerful and with less impact on trading operations by virtue of being a company side rather than an insolvency procedure. It can also bind secured creditors as well as unsecured, unlike a CVA. Case examples included one Restructuring Plan with costs of c.£600k, which once approved enabled EBITDA to move from a negative +£8m. For another case, the lease savings on day one covered professional fees related to the Restructuring Plan being sanctioned.

- The power of the process also provides the potential to accelerate the delivery of a turnaround – whilst a typical intervention might take around 12-18 months, a Restructuring Plan can enable delivery in under 6 months (following an options appraisal).

- Much of the discussion focused on the barriers of costs and time, particularly for smaller and mid-market companies. The following issues were identified:
    - The need for working capital to create a funding bridge to a Restructuring Plan.
    - Whilst the increased value outweighs process costs, creating a clear business case, funding the cost of a Restructuring Plan is an immediate practical issue for smaller companies.
    - Case law continues to develop and the Court of Appeal judgement in the Adler case increases certainty with regard to expectations. However, the process as developed, using as its basis Scheme of Arrangement documentation, increases costs for smaller companies with a simpler debt structure; there is room for streamlining in this regard in order to open the process up to a larger range of companies.
- The role of an independent CRO/turnaround director can be crucial in providing an independent assessment of a company's situation to enable a robust Restructuring Plan, in managing stakeholders through the plan process and in helping the board to deliver the underlying change.
- As a non-insolvency process Restructuring Plans present significant advantages in regulated sectors, enabling the continuation of a regulated company as a going concern, addressing key liabilities/rightsizing businesses - whilst avoiding administration and the related licensing implications. As such, there are significant benefits not only for companies but for continuity of services for service users/ customers, as well as averting costly regulator action that will have associated sector and/or taxpayer costs and reputational impacts.

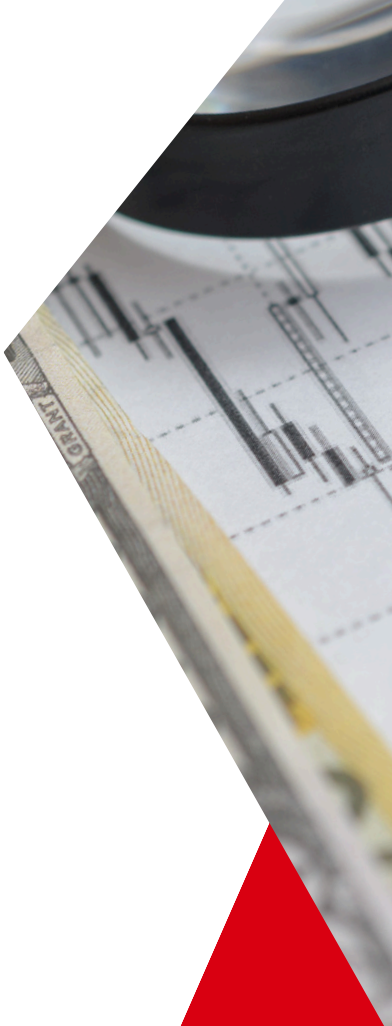
- Participants suggested that the option of a Restructuring Plan can help focus and drive discussions towards consensual agreement and is therefore a powerful tool for negotiations. The IFT has sought further evidence on this from a follow-up survey of participants, which is appended to this report.

- We held a dedicated Asset-Based Lenders roundtable event. The potential in relation to ABLs due in part to their fixed charge over debtors, combined with their close understanding of their clients' financial position, means that they are in a strong position to recommend consideration of a Restructuring Plan at an earlier point on the distress curve and indeed to fund the process. In terms of outcomes, the practical difference between an administration and a Restructuring Plan is that insolvency is avoided, reducing the risk of customer attrition.

- For private equity providers, there are clear advantages, both in terms of addressing challenges thrown up by the operating environment for existing portfolio companies, and opportunities to invest in mid-market companies through this process. The fact that this is a company law procedure presents significant benefits – enabling company debt issues to be addressed in the context of continued trading and the ability to invest new money toward improved profitability and operations - whilst protecting the equity position.

- The contribution of the process to the attractiveness of the UK as jurisdiction of choice for restructuring, reflecting the power and flexibility of the tool, and the certainty afforded by the quality of our judiciary was identified, with key case law examples.

- Landlords and their representative bodies raised concerns regarding engagement and the availability of information prior to hearings. Whilst recognising the short runway and commercial sensitivities, we believe that there are opportunities to improve engagement, similar to the position developed over time in relation to CVAs.



- Against this, it was noted that as an effective tool in relation to company rescue, we have seen some cases where there has been a benefit to landlords by putting companies on a more secure financial and operational footing and, in some cases, a return to leased premises, with a more sustainable business model.

- Engagement with HMRC, both in terms of Time to Pay arrangements that may avert the need even for this company side process, and when launching a Restructuring Plan, was a theme across round table meetings. The recent guidance (*Using debt management schemes to restructure a company's finances*) published by HMRC was welcomed as confirming broad principles. There is potential for expansion/development of the guidance as practice develops. In addition, company advisers would welcome the ongoing development of engagement in relation to companies launching a Restructuring Plan and greater consistency in relation to Time to Pay responsiveness and arrangements.

- There was a recognition at the roundtables of the particular position of HMRC as an involuntary creditor and public policy considerations. There has been an evolving approach from companies, their advisers and HMRC. Indeed, there have been helpful instances of TTP agreements with HMRC both within a Restructuring Plan process and in parallel to a process. An escalation process or protocol for companies considering a Restructuring Plan or facing insolvency processes could be helpful.

- There have been some cases where there were pension schemes involved as part of a business' restructuring, but they have so far been left outside Restructuring Plan applications to date. In the absence of a test case involving a scheme, the view was that there are two potential modes of incorporation into a Restructuring Plan. Shortfalls under section 75 of the Pensions Act 1995 were posited as unlikely to be relevant to the circumstances of a Restructuring Plan as the debt does not crystallise until there is an insolvency event.

- The alternative area, where a pension scheme does represent a current cost to a business, is deficit repair contributions (DRCs). These could in theory be compromised with a lower DRC and deferrals, but with questions regarding how such compromises under a Restructuring Plan would then be dealt with in light of three-year valuation cycles for DRCs.

- Discussion covered the possibilities of having alternative processes - such as a CVA or a regulated apportionment arrangement - alongside a Restructuring Plan. The use of this mechanism could be incorporated into the terms of the Restructuring Plan, to honour this parallel arrangement. This is case specific and as with other stakeholders, early engagement with the Pension Protection Fund, The Pensions Regulator and pension trustees is key, as well as *pari passu* considerations regarding the position of the pension scheme vis a vis other creditors.

Recommendations

- We recommend that Restructuring Plans should be considered as a default option for companies and their advisers assessing their position in relation to financial stress and distress. The IFT commits to engaging with companies, their advisers and representative bodies to make the benefits of this relatively new process more widely understood.

- We recommend that turnaround advisers and stakeholders familiarise themselves with the process and expertise developed through case law. In turn, The IFT commits to provide ongoing training to members and partners, and engagement alongside partners such as R3.

- We encourage the market to develop working capital options for stressed but viable companies to bridge to a Restructuring Plan.

- Similarly, we encourage the market to develop suitable models to fund costs of Restructuring Plans with a focus on smaller companies and those in the mid-market.

In both instances above The IFT commits to engaging with stakeholders in this regard to outline the opportunity and provide connections to expertise.

- We recommend that regulators consider the opportunity presented by Restructuring Plans for companies within their sectors to act early in order to avoid loss of provider/service, whilst retaining regulatory licenses. The IFT commits to promoting greater understanding with regulators and where possible with the companies that they regulate.

- We would welcome further development of engagement and approach within HMRC in relation to companies launching a plan and in relation to Time to Pay responsiveness and arrangements, to maximise certainty for businesses and their advisers. The IFT commits to facilitating market knowledge and market expertise on a suitably impartial basis in this regard.

- We recommend that company advisers and landlord representatives seek to develop engagement and a commercially sensitive approach to information. The IFT will work with the British Property Federation to consider the best means of achieving this position, including facilitation of engagement and provision of training/information to BPF members.

- We recommend that the judiciary consider specific judicial directions in relation to the level of documentation and evidence required in relation to companies with a simpler debt structure, and where the value break is clear. The IFT commits to engagement with the judiciary to discuss good practice/expectations for smaller and simpler entities and to help develop a guide to these expectations for practitioners.

- The IFT is also able to facilitate engagement and knowledge sharing for the judiciary particularly as cases are heard in wider commercial court settings, in addition to sharing evolving market practice, risks and horizon scanning.

Next steps

The IFT will be sharing the findings of the roundtables and survey and will continue engagement with key stakeholders in relation to recommendations.

As part of our ongoing work on Restructuring Plans, we will continue to monitor market responses and engage with the market, businesses and other stakeholders, including in relation to training and production of resources and analysis. This will include case studies, guides to business scenarios, and other outputs.

We would like to thank partners, members and wider stakeholders for their proactive input and engagement in this process and would welcome views on any of the issues raised in this report and regarding Restructuring Plans more broadly.