SLAUGHTER AND MAY/

M&A, LITIGATION AND REGULATION - EMERGING THEMES FROM THE PREMIER OIL RESTRUCTURING

Navigating the Storm – Part of the Horizon Scanning series

The merger of Premier Oil plc ("Premier") and Chrysaor Holdings Limited ("Chrysaor") completed on 31 March 2021, with Premier's shares being readmitted to trading the following day under the new name of Harbour Energy plc. Harbour Energy is now the largest independent oil and gas company listed on the London Stock Exchange with combined production of over 250 kboped.

For Premier, a company founded in 1934 as the Caribbean Oil Company to pursue oil and gas exploration and production activities in Trinidad, and floated on the stock market as Premier (Trinidad) Oilfields two years later, the merger marks the start of a new chapter in its long history. At the same time, it represents the culmination of Premier's efforts - which have been ongoing for the past five years - to address its over-levered balance sheet. These included the first schemes of arrangement in either England or Scotland to receive organised creditor opposition for several years, and the first use of the new restructuring plan procedure by a listed company.

This Horizon Scanning piece provides an overview of the complex events over the past two years and draws out a number of themes which will be of relevance to future restructurings.

Overview of events

28 JULY 2017	Premier completed an "amend and extend" transaction - implemented via two schemes of arrangement before the Court of Session in Scotland - with all its debt maturities being pushed out to May 2021.
7 JANUARY 2020	With the May 2021 maturities approaching, Premier attempted to execute an acquisition of producing assets, which was expected - by increasing Premier's asset base, facilitating an equity raise and accelerating deleveraging through additional cashflows - to provide a pathway to a future refinancing. Premier therefore announced: - The proposed acquisitions of the Andrew and Shearwater assets from BP for US$625 million and an additional interest in Tolmount (where Premier was already the operator and the largest JV party) for upfront consideration of US$191 million - A US$500 million equity raise, which was underwritten on a standby basis - The proposed extension of its debt facilities to November 2023 (the "2020 Transaction"). Creditor consents would be sought through two Scottish schemes of arrangement (the "2020 Schemes"), with the maturity extension being conditional upon the equity raise and one of the Andrew or Tolmount acquisitions completing. Asia Research and Capital Management ("ARCM") - Premier's largest creditor who also held a large short position in Premier (equal to 16.85% of Premier's shares) - opposed

	the 2020 Schemes. On the day before the convening hearing, ARCM applied for an injunction to prevent their launch, which was successfully resisted by Premier. ARCM subsequently appeared at both the convening and sanction hearings.
29 APRIL 2020	The Court of Session rejected each of the grounds of challenge raised by ARCM. ARCM later lodged an appeal against the sanction decision. However, with the fall in oil prices during this period (from US$68.6 per barrel on 3 January 2020 to US$21.44 per barrel on 24 April 2020), it became clear that implementation of the 2020 Transaction (including the maturity extension) was unlikely to be commercially viable. At the same time, the depressed oil price environment resulted in Premier forecasting breaches of its financial covenants for the upcoming testing period. Premier began discussions with an informal working group of creditors (the "IWG") regarding the terms of a financial covenant waiver. ARCM had the ability to veto any such waiver.
5 JUNE 2020	Premier reached a settlement with ARCM in respect of the 2020 Schemes.
9 JULY 2020	Premier entered into a "stable platform agreement" – which provided a temporary waiver of its financial covenants – with its creditors (including ARCM). Premier then began a process to identify a refinancing solution ahead of its May 2021 maturities. Given the uncertain oil price environment, and the risks to deal execution arising from the complexity of Premier's capital structure, multiple options were explored in parallel. This included running a process to determine whether a strategic investor might be interested in taking a significant minority stake in the group.
20 AUGUST 2020	Premier announced the conditional agreement of a refinancing transaction similar to the 2020 Transaction: - A longer maturity extension (to March 2025) - The acquisitions of the Andrew and Shearwater assets on revised terms (for upfront consideration of US$210 million) - An equity raise of up to US$530 million. To ensure a minimum amount of debt reduction, the transaction would be conditional upon an equity raise of at least US$325 million, with the remaining US$205 million being underwritten by creditors (the "Standalone Transaction").
15 SEPTEMBER 2020	Following press speculation, Premier confirmed that it was in discussions with a number of third parties regarding alternatives to the Standalone Transaction. One of those parties – Chrysaor – had proposed a merger with Premier as part of the strategic investment process (the "Chrysaor Transaction").
6 OCTOBER 2020	The IWG and ARCM decided to support the Chrysaor Transaction. This followed the downward trend in the oil price – and with it Premier's share price – during September 2020 (from US$45.81 per barrel on 28 August 2020 to US$39.27 per barrel on 2 October 2020), which brought increased doubt around Premier's ability to raise the minimum amount of equity required by the Standalone Transaction.

	In light of this feedback and the challenging macroeconomic conditions, Premier concluded that the Chrysaor Transaction – which was of broadly comparable value to shareholders – had greater execution certainty than the Standalone Transaction. The key terms of the Chrysaor transaction were: - Premier acquired Chrysaor by way of a reverse takeover in exchange for the issue of shares to Chrysaor's shareholders - Premier's existing creditors received their share of US$1.23 billion in cash and the choice between shares in the combined group or a further cash payment (capped at US$175 million in aggregate). At completion, this equated to a total cash recovery for senior creditors of 64% (for those electing the equity option) and 78% (for those electing the cash alternative) - Creditors were able to subscribe at a fixed price for those shares which were not taken up by creditors electing the cash alternative - All of Premier's letters of credit were refinanced and its undrawn commitments cancelled - The share capital of the combined group at completion was held 77% by Chrysaor's shareholders, 18% by Premier's creditors and 5% by Premier's shareholders.
31 MARCH 2021	Following satisfaction of all conditions – which included shareholder approval, various regulatory and antitrust approvals and creditor consent – the Chrysaor Transaction completed. Creditor consent was sought via two Scottish restructuring plans under Part 26A of the Companies Act 2006.

Themes for future restructuring transactions

Use of M&A

Each of the 2020 Transaction, the Standalone Transaction and the Chrysaor Transaction combined M&A with a restructuring of Premier's debt facilities. In the case of the first two, the acquisition of producing assets – which was expected to facilitate a future refinancing – was a central part of the story to creditors for the proposed maturity extensions. With the Chrysaor Transaction, the combination of a significant base cash recovery and the choice between participating in potential equity upside or exiting completely with a further cash payment was important in winning support for the transaction across Premier's diverse creditor group. These features were achievable because the merger created a combined group with a stronger balance sheet and larger portfolio of producing assets and growth opportunities, and would have been difficult to replicate through any alternative structure.

In some ways, the use of acquisition structures is fairly unique to the specific circumstances of these transactions – it is an unusual feature of oil and gas financings that debt capacity is tied to production and reserves, and Chrysaor's private equity owners were drawn to the reverse takeover structure as a way of achieving a listing for Chrysaor. However, as the global economy emerges from the COVID-19 crisis, with consolidation likely across a range of sectors, it would not be surprising to see companies (both those in distress and potential acquirers) and their advisers thinking creatively to develop similar structures. There could well be other scenarios (for example, where the debtor company has a particular regulatory status) where the blueprint of reverse takeover combined with debt restructuring has advantages versus purchasing assets out of an insolvency process.

Addressing conditionality

While it is unusual for restructuring transactions to be twinned with acquisitions, they are more frequently conditional upon the execution of major disposals or equity raises. In any of these scenarios, the debtor company and its creditors are exposed to the risk that failure to satisfy some condition (including as a result of a change in market conditions) may prevent the corporate transaction from being executed.

This risk materialised on a number of occasions during Premier's restructuring process. The acquisitions and equity raise which formed part of the 2020 Transaction ceased to be commercially viable as a result of the convergence of the fallout between OPEC and Russia with the onset of COVID-19. Fortunately, there proved to be time for Premier to develop alternative options before the May 2021 maturity date. Similarly, the decision to proceed with the Chrysaor Transaction as opposed to the Standalone Transaction was informed in part by the uncertain market outlook at the time. The Chrysaor Transaction itself was subject to a reasonably significant degree of execution risk, given the range of regulatory and antitrust conditions. The risk was mitigated to some degree by creditors' agreement to an interim maturity extension (to March 2022), which would have given breathing space to finalise the transaction if completion was delayed, or to develop an alternative if it fell over entirely.

Although the need to prepare fall-back plans is not specific to restructuring transactions executed during this stage of the economic recovery, the number of companies seeking to raise new financing as an alternative or condition to a wider restructuring and the challenges in forecasting future financial performance do increase the importance of contingency planning and running alternative options in parallel for as long as possible.

Risk of opposition

The 2020 Schemes were the first schemes of arrangement in either England or Scotland to receive organised creditor opposition for several years. Since then, however, there has been a proliferation of contested schemes and restructuring plans, including the Codere and Sunbird schemes and the Virgin Active restructuring plan which is currently ongoing. This trend seems likely to continue, not least given the likelihood of dissenting creditors seeking to challenge the application of cross-class cram-down within the restructuring plan procedure. Where a scheme or restructuring plan is contested, the process can take on some of the characteristics of commercial litigation – and debtor companies will be well-advised to tailor their approach and dealings with third parties accordingly (for example, taking steps to control creation of documents and maintain privilege).

One area of focus from ARCM on the 2020 Schemes was the adequacy of disclosure in the explanatory statement. Although Premier made a significant amount of additional information available to ARCM in response to its requests, Lady Wolffe was satisfied that Premier's explanatory statement was sufficiently detailed without this information. As Snowden J acknowledged in his Virgin Active convening judgment, there will often be a tension between acceding to disclosure requests from opposing creditors and seeking to minimise the disparity of information between creditors. Requests for information will likely need to be considered on a case-by-case basis but, in order to keep on the front foot, it may nevertheless be prudent for debtor companies to put in place a disclosure process which maintains a balance between these competing objectives.

Another theme which runs across the 2020 Schemes and other recent restructurings is the prospect of an opposing creditor seeking to extend the scheme or restructuring plan timeline. While ARCM argued that it needed additional time to prepare evidence and that a two week sanction hearing was required in order to allow full cross-examination on both sides, Lady Wolffe accepted Premier's position that this was unnecessary and – by running up against the long-stop dates under the acquisition documents – would effectively cause the 2020 Transaction to fail. In cases like the 2020 Schemes and Virgin Active, where the debtor company can point to good reasons for maintaining a conventional (or even

slightly compressed) timeline, it seems likely that the court will do its best to accede to that request. Debtor companies will though need to provide sufficient evidence as to the timing imperative, and may be expected to work to very tight timelines in order to prepare evidence and respond to information requests, which can represent a significant strain on company resources.

Scrutiny of comparator

As part of the 2020 Schemes, Premier's presentation of the comparator – namely that there was a very substantial risk of entry into a formal insolvency process before May 2021 if the schemes were not sanctioned – came under considerable scrutiny. ARCM submitted a report from an insolvency practitioner which stated that there should be time prior to the maturity date to consider and negotiate alternative restructuring options. In her judgment, Lady Wolffe found the evidence from Premier's finance director significantly more convincing than this expert report, placing considerable weight on the fact that he had first-hand experience of the challenges in developing and negotiating the 2020 Transaction and Premier's previous restructuring, whereas the report was effectively a theoretical exercise.

Given the fundamental importance of the "relevant alternative" under Part 26A restructuring plans, the comparator is likely to remain a key area of focus for opposing creditors. In cases where this is an immediate liquidity shortfall it may be relatively clear that the relevant alternative is an insolvency process, in which case the battleground is likely to be how the group has been valued and the administration outcome modelled – an area where financial experts will be best placed to express a view. However, where insolvency is less imminent or inevitable, opposing creditors may also seek to argue that the relevant alternative is not an insolvency process but another deal entirely. It seems likely that director evidence will continue to be important in these circumstances, with opposing creditors facing the difficulty of not necessarily understanding all the background and dynamics to the restructuring and of explaining why an alternative would command sufficient support among other creditors.

Approach of FCA

In connection with the Chrysaor Transaction, Premier sought a derogation from Listing Rule 9.3.11 (which requires any issue of shares for cash to be made on a pre-emptive basis) in respect of shares that were being issued to its creditors. This requirement conflicts with the disapplication of statutory pre-emption rights in respect of shares issued pursuant to restructuring plans. The Financial Conduct Authority (FCA) would grant the derogation only if Premier could satisfy the conditions in Listing Rule 10.8.3 (which apply to companies in severe financial difficulty). Those conditions – which the FCA admitted set a very high bar – could not be met in the circumstances, and so Premier proceeded with seeking a shareholder resolution to disapply statutory pre-emption rights in parallel with its restructuring plans. The FCA was also clear that it would not be prepared to relax the requirement for shareholder approval of Class 1 transactions or reverse takeovers.

In the event, the FCA's decision did not have a detrimental effect on the Chrysaor Transaction since each of the required shareholder resolutions was approved by a very high majority. However, it serves as a reminder that the FCA's priorities as a regulator are not necessarily aligned with facilitating restructuring transactions, even if that would appear to be inconsistent with Parliament's objectives in introducing Part 26A of the Companies Act. As other listed companies come to restructure using the restructuring plan procedure (Premier was the first of these), it will be interesting to see whether the FCA takes a more flexible approach – particularly in circumstances where the company can show that the alternative to its restructuring is an immediate administration in which shareholders will receive nothing.

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This briefing is part of the Slaughter and May Horizon Scanning series

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