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Case No: CR-2020-003816

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 30 September 2020

BEFORE:

SIR ALASTAIR NORRIS

IN THE MATTER OF PIZZAEXPRESS FINANCING 2 PLC

MR D ALLISON QC AND MR R PERKINS appeared on behalf of the Plan Company
MS F TOUBE QC AND MR A AL-ATTAR appeared on behalf of the Ad Hoc Group

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APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

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1. SIR ALASTAIR NORRIS: The COVID-19 lockdown and the subsequent COVID-19 restrictions threaten to devastate whole sections of the casual dining business sector which was already facing a challenging business environment.

2. The Pizza Express Group is caught up in this turmoil. The Group had in the 2019 financial period reported an incurred loss of £354 million, and temporary closure followed by restricted trading has only worsened that position.

3. On 20 March 2020, the Pizza Express Group closed all of its 449 company-owned restaurants in the United Kingdom and furloughed all of its 9,500 restaurant staff. It also closed 19 of its restaurants in Ireland.

4. With the easing of restrictions in July, it began re-opening restaurants for dine-in customers and also extending its dine-out offering, but that program has been disrupted by the renewed work-from-home directive and its impact upon the office worker market.

5. As at 25 September 2020, 348 of the 449 venues in the United Kingdom had re-opened and 17 of the 19 Irish venues. But the consequences are dramatic. Recent cashflow forecasts indicate negative cashflow for the Group as from the end of the week commencing 9 November 2020 imperilling its ability to continue as a going concern and raising the real prospect of a value destructive administration or other insolvency process.

6. The Group's Board considers that the current level of debt is unsustainable and the financial position is not sufficiently robust to continue as a going concern. The Group therefore seeks to implement a financial and operational restructuring. The means of doing so is the promotion of a restructuring plan under Part 26A of the Companies Act 2006 as inserted by the Corporate Insolvency and Governance Act 2020, a plan being promoted by Pizza Express Financing 2 plc ("the Plan Company").

7. The Plan Company is incorporated in the United Kingdom and is a wholly-owned subsidiary of Pizza Express Financing 1 plc ("the Plan Member"). The Plan Member is

itself a direct subsidiary of an ultimate holding company which belongs as to about 55 per cent to funds managed by Hony Capital and as to the balance by Chinese interests and the Group's management. In the organogram of the Group's structure, the Group operating and property-holding companies sit below the Plan Company.

8. The financial restructuring proposed is in part a debt-for-equity swap and in part an old-debt-for-new-debt swap. The ultimate objectives of the restructuring are six: (1) to provide the restructured Group with a de-levered balance sheet with a lower overall gross debt; (2) to reduce the overall cash debt service costs and provide flexibility to service the debt incurred; (3) to inject additional liquidity to fund the transaction costs and to ensure that the restructured Group has adequate liquidity to trade and to grow; (4) to mitigate the risk of the Plan Member, the Plan Company or any other Group company having to file for administration; (5) to avert any imminent refinancing risk in relation to the Group's existing debt which is imminently due to mature; and (6) to provide Plan creditors with the opportunity to benefit from any potential upside from the implementation of the turnaround strategy by swapping some of the debt for an equity participation.

9. Since I shall be concerned to consider the present rights of creditors which are to be released or varied and their prospective rights by way of compromise under the proposed plan, I should describe at the outset the present financing arrangements.

The Plan Company

10. The Plan Company has the benefit of a £70 million super senior loan granted in April 2020 and due to mature in April 2023. It is governed by English law. It was in effect an emergency measure put in place.

11. Secondly, it has the benefit of £465 million worth of lending under senior secured notes on which there is also some accrued unpaid interest. These notes are due to mature in August 2021 and they are governed by New York law. In argument, these have been called "the Existing SSNs". The Plan Company is the issuer of the Existing SSNs.

The Plan Member

12. The Plan Member has £200 million worth of senior unsecured notes plus some unpaid interest. These notes are due to mature in August 2022 and are governed by New York law. In argument these were called "the SUNs". The Plan Member is in default. A Contribution Deed of 1 September 2020 provides that the Plan Member has a right of contribution against the Plan Company and has thereby made the Plan Company effectively a primary obligor under the SUNs. Secondly, the Plan Member has the benefit of a subordinated shareholder's loan from the ultimate holding company, the balance on which is some £546 million. Under an intercreditor agreement entered into in 2014, this ranks at the bottom of the waterfall.

13. Both the Existing SSNs and SUNs are issued in global note form under which the beneficial owners are entitled to be treated as contingent creditors (see *Castle HoldCo 4 Limited* [2009] EWHC 3919). They are traded on Euroclear and Clearstream.

14. Neither the super senior loan nor the shareholder's loan to which I have referred is to be varied or compromised. The instruments that are to be varied or compromised are the Existing SSNs and the SUNs.

What is Proposed?

15. From negotiations with an Ad Hoc Group of holders of 78 per cent of the Existing SSNs, which commenced in April 2020, emerged a proposal. It is the subject of a "lockup agreement" under which 93.2 per cent of the Existing SSN holders and 47 per cent of the SUN holders have agreed to support the proposal.

16. There are six elements to the restructuring plan which is being proposed. Firstly, there will be a new corporate structure under which the share capital of the Plan Company and its intercompany receivables will be transferred from the Plan Member to a new company called at the hearing "BidCo SPV". This new company will be a wholly-owned subsidiary of another new company, called at the hearing "HoldCo SPV". HoldCo SPV, BidCo SPV, the Plan Company and theoperating and property holding subsidiaries to which I have referred will form the restructured group.

17. Secondly, the Existing SSNs will be discharged. They will be converted into a series of new senior secured notes issued by BidCo SPV but with a reduced principal amount of £200 million. They will mature five years from the closing of the financial restructuring, thereby providing an extension in funding.

18. Thirdly, the Existing SSN holders will receive 63 per cent of the equity in the restructured group in the form of shares in HoldCo SPV.

19. Fourthly, the Existing SSN holders will be entitled (but not obliged) to lend new money to the restructured group by participating in a £144 million new money facility to be borrowed by BidCo SPV. This new money facility will in the event of enforcement rank senior to the new SSNs to be issued but junior to the super senior facility. In order to create an incentive for Existing SSN holders to participate in the new money facility, there is an allocation of 35 per cent of the shares in HoldCo SPV available to new money facility participators.

20. Fifthly, the SUNs will be discharged and will not be converted into any new debt instruments. As matters stand, they are out of the money. There would be a nil return to them in the event of an administration. The SUN holders will however in compensation receive one per cent of the equity in the restructured group by an allocation of shares in HoldCo SPV.

21. Sixthly, the Existing SSNs and SUNs are, as I have indicated, governed by New York law, so the Plan Company intends to apply for recognition of the Plan under chapter 15 of the US Bankruptcy Code. The plan provides for the appointment of a foreign representative to make such an application.

22. The present application is made under Part 26A of the Companies Act 2006. It is a convening hearing proposing the convening of three meetings to consider the proposal I have outlined.

23. Before turning to the detail, I should make two general points. The first is that this is the convening hearing, and it is emphatically not my role to consider the merits or fairness of the proposed plan. This will be the subject of the sanction hearing if

approved by the relevant statutory majority (see *Telewest Communications* [2004] BCC 342, paragraph 14, per David Richards J). Matters not going to fairness but which could make it without point to convene the meetings (because they cast a blot on the scheme or present a roadblock in the way of its approval) do however fall for consideration, at least on a provisional basis.

24. The second point to make is that this is a new jurisdiction albeit closely related to the well-established scheme jurisdiction. I intend to follow exactly what has already been decided in relation to this new jurisdiction (because there are no proper grounds for departing from any of the relevant previous decisions) and also to resist the temptation, so far as I can, to reformulate in my own words principles that are well established in the context of schemes of arrangement, lest some change of emphasis or nuance is detected which I do not intend. I shall simply identify the issues for decision, my determination of those issues, and the reasons for that outcome.

25. The first matter for consideration is the one of jurisdiction, and that raises five sub-issues. Firstly, section 901A of the 2006 Act is available to a "company", which means any company liable to be wound up under the Insolvency Act 1986. I am satisfied that the Plan Company is indeed a company within the statutory definition being incorporated in England and Wales and having its COMI here.

26. Secondly, to invoke the jurisdiction, it must be shown that the applicant 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. I find that this requirement is satisfied. The evidence shows that the Board has concluded that the Company's status as a going concern is prejudiced by its present financial position, and it explains why that is so, as I have endeavoured to summarise at the outset of this judgment. There is no challenge to this evidence, and its truth is recognised by the Ad Hoc Holders Group and the negotiations which it entered in April 2020 in view of the impending maturity of the Plan Company's indebtedness.

27. Thirdly, the applicant company must demonstrate that what is proposed is a "compromise" or "arrangement" between itself and its creditors or any class of them and its members or any class of them. This particular requirement was considered by

Trower J in *Re Virgin Atlantic* [2020] EWHC 2191 (Ch) at paragraph [38], and I intend to adopt the approach that he there set out to this requirement. The plan undoubtedly contains the requisite elements of "give and take" which have been established as necessary in the scheme jurisdiction.

28. The fourth sub-issue is that the purpose of the Plan must be to eliminate, reduce or mitigate the effect of the company's financial distress. I am satisfied on the evidence that that is the very object of this plan, as is set out in the witness statement of Andrew Pellington, a director of the Plan Company and the Chief Financial Officer of the Pizza Express Group of companies.

29. Fifthly, insofar as the holders of Existing SSNs or SUNs are domiciled in the EU, I must be satisfied that they are properly brought before the court under the recast Judgments Regulation 1215/2012. I shall adopt the established conventional approach in the context of schemes of assuming that the Recast Judgments Regulation does indeed apply to restructuring plans for the purpose of allocating jurisdiction within the EU but that Article 8 is engaged. This is the article which permits EU defendants to be sued in England where there is at least one English domiciled defendant and it is expedient to try the claims together.

30. I shall follow the approach set out in *Re DTEK Finance* [2017] BCC 165 and [2016] EWHC 3563. On the evidence, I am satisfied that if the Recast Judgments Regulation applies, there is at least one English-domiciled creditor in each class or that there will be by the time of the sanction hearing. The Plan Member is of course a UK company. It is a matter for the sanction hearing whether, jurisdiction being satisfied, that jurisdiction is fairly exercised, but that is not an issue for the convening hearing.

31. So I am satisfied that I have jurisdiction to consider the Plan.

32. The second group of issues for decision is as to the constitution of the relevant classes. It is proposed to hold separate meetings of the Plan Member, of the holders of the Existing SSNs and of the holders of the SUNs.

33. Section 901C(1) of the 2006 Act provides that the Court may on an application under this section order a meeting of creditors or class of creditors or the members of the Company or a class of members to be summoned in such a manner as the court directs.

34. As the explanatory notes to the 2020 Act make plain, it is expected that the overall commonality between the Part 26 jurisdiction and the Part 26A jurisdiction will enable the courts to draw on the existing body of Part 26 caselaw where it is appropriate. The decision of Snowden J in the *Virgin Atlantic* sanction hearing ([2020] EWHC 2376 (Ch)) at paragraph [44] is to the effect that that explanatory note can be drawn upon to construe amongst other things section 901C.

35. In the *Virgin Atlantic* convening hearing ([2020] EWHC 2191 (Ch)) at paragraphs[44] to [48], Trower J decided that the approach to classifying creditors for a restructuring plan under Part 26A should be broadly the same as had been adopted for Part 26. The principles determining class composition under Part 26 are well known and would not benefit from a further reiteration by me. It is sufficient to refer to the lodestar decision in *Re Sovereign Life* [1892] 2 QB 573 at 583 and to the summing up of the decisions which have followed that case by Hildyard J in *Re Primacom Holding* [2013] BCC 201 at [44] to [45]. The key factor is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. But I would emphasise the words "to make it impossible for them to consult together with a view to their common interest".

36. It is clear that in the instant case there must be separate meetings of the holders of the Existing SSNs, of the SUNs and of the Plan Member. Firstly, the Plan Member is a shareholder and not a creditor. Its rights as are and as would be in an insolvency and as are under the proposed plan are fundamentally dissimilar from those of the holders of Existing SSNs and SUNs. It is clear that a class meeting of a single entity is possible (see *Re Altitude Scaffolding* [2006] BCC 904 at paragraph [12]).

37. Secondly, the SUNs are subordinated to the Existing SSNs under the existing regime and are “out of the money”. They are treated differently to the Existing SSNs under the Plan in that the SUNs are discharged and in return only a small equity allocation is proposed (but better than the prospective nil return on the SUNs).

38. The one question that arises is whether the class of SUN holders should be fractured because some of the SUN holders are affiliates of Hony Capital, the majority owner of the existing HoldCo. Issues of cross-holding might arise. In my judgment, they do not fracture the class. I shall apply the reasoning of Hildyard J in *Re Primacom* at paragraphs [44] to [49]. Cross-holdings are immaterial when comparing the rights of the creditors as such, although they may be material when considering whether the outcome of the meeting as convened is representative of the class.

39. Thirdly, the Existing SSNs stand in a separate class from the SUNs because as matters now stand they (i) have enforceable security and (ii) would receive a return in an administration; and as matters are proposed under the plan they will receive (i) new senior secured notes (albeit with a reduced value) and (ii) an equity participation to compensate them for the haircut which they are taking.

40. In their case, the question is whether there should be a further fracturing of the class, because some features of the Plan make it impossible for the holders of Existing SSNs to consult together with a view to their common interest.

41. This raises four sub-issues. Firstly, issues are raised by the new money provisions. Some Existing SSN holders will provide £144 million worth of new money to BidCo SPV to fund the restructured business. At present, some 93 per cent of them have elected to participate in the new money provision, which also entitled them to extra equity. In my judgment, this does not fracture the class. All holders of Existing SSNs have the right to participate in this new money facility, a right which will be exercisable down to a date immediately before the Plan meetings. I would apply the reasoning of Hildyard J in *Primacom* at paragraph [54] and decide that this feature does not fracture the class.

42. Secondly, in the course of negotiating the scheme, certain members of the Ad Hoc Group agreed to underwrite (or "backstop") the new money facility. For this, they have received or will receive a backstop fee. In my judgment, this does not fracture the class. Being assured of raising new money was essential to the Plan and to an associated CVA. The fee is payable for the provision of a commercial service, namely underwriting. On the evidence, it is at normal market rates and was negotiated

at arm's length. It is not disguised additional consideration for the discharged Existing SSNs. I shall adopt the same approach as that adopted by Snowden J in *Re Noble Group* [2019] BCC 349 at paragraphs 153 to 154, noting that there are many other such cases in which this principle has been adopted.

43. Thirdly, some of the Ad Hoc Group retained advisors in the course of the negotiation. The Plan provides for the expenses of the retaining of those advisors to be reimbursed. I hold that this does not fracture the class. For reasons succinctly summarised by Zacaroli J in *Re Lecta Paper UK* [2019] EWHC 3615 the reimbursement of these expenses does not constitute any bounty or any additional consideration. It is simply reimbursement of expenditure incurred in the creating of the Plan for the benefit of all creditors.

44. Fourthly, under an associated shareholder agreement, certain participators receive directors' nomination rights. The two largest shareholders in HoldCo SPV will have the right to nominate non-executive directors and to veto the appointment of the chairman. In my judgment, this does not fracture the class either. These rights are simply a function of the size of the shareholding rather than being different rights attaching to the shares themselves. It is, as Ms Toube QC pointed out in the course of the hearing, a right to nominate someone who on appointment will owe fiduciary duties to all shareholders and who will be independent, not the placeman of the appointor. I will adopt to this provision the same approach as that taken by Snowden J in *Re Stemcor* [2016] BCC 194 at [21] to [23] - in particular (i) endorsing his view that these nomination rights are in any event not of such materiality as to make it impossible for the holders of the SSNs to consult together with regard to their common interest and (ii) adopting his reluctance to constitute a small class with a power of veto.

45. Those I think are the issues that I have to decide in relation to the constitution of classes. The next group of issues I must decide is whether it is appropriate to convene meetings, having regard to the timing and nature of the notice given.

46. The first sub-issue under this head is whether there has been adequate notification. The practice statement letter pursuant to the Practice Statement of the Chancellor of 26 June 2020 requires that sufficient notice be given in concise form of the Plan to the

participating creditors. The word "sufficient" is of course intensively fact-dependent affected by matters such as the complexity of the scheme, the length of time over which there has been consultation and the urgency of implementing the Plan.

47. In the instant case, the outline of the Plan was clear from a proposed “lockup” agreement that was circulated to all participating creditors in early August 2020. The practice statement letter itself was dispatched on 1 September 2020, and I have considered the detailed evidence relating to that dispatch. It was uploaded to a scheme website. It was supplemented by a further practice statement letter which extended the period for participating in the new money offering and dealt with other matters apparent from the proffered “lockup” agreement. I am satisfied that no issues arise as to the terms or as to the timing of the practice statement letter. Twenty-nine days is in the present context sufficient notice.

48. The second sub-issue that arises under this head is a consideration of the explanatory statement. The practice statement requires the Court to consider the adequacy of the explanatory statement and to check that it is in appropriate form. I have done so. It is some 150 pages in length (excluding appendices), and so far as I can see, communicates all material matters in a way that would be readily comprehensible to its intended addressees. I am satisfied in those circumstances that it is appropriate to convene meetings following the circulation of that explanatory statement.

49. The fourth set of issues that I must decide is whether the proposed arrangements for convening and conducting the Plan meetings are appropriate. No advantage would be gained by my setting out these matters in detail. Suffice to say that they are for the most part entirely conventional, and insofar as they contain an element of relative novelty, for example that the meetings may be conducted remotely, they are aligned with the analysis of Trower J in *Re Castle Trust Direct* [2020] EWHC 969.

50. As ever, it is of course a question for the sanction hearing whether these arrangements produce an outcome that can be taken as fairly representative of the creditors' and members' view, but that is not my task at this convening hearing.

51. Finally, I must decide whether there are any blots on the scheme or any roadblock in the way of its implementation. My attention has been drawn to three matters.

52. Firstly, the Plan provides for the release of all obligors, the Plan Company, the Plan Member and the guarantors of their indebtedness. As Snowden J explained in *Re Noble Group* [2018] EWHC 3092 (Ch) at paragraph [24]:

> "It is well established that the Court has jurisdiction under Part 26 CA 2006 to sanction a scheme which includes a mechanism … under which scheme creditors are required to release claims against third parties where such a release is necessary in order to give effect to the arrangement between the company and the scheme creditors. That test is most clearly satisfied where the scheme compromises debts which are guaranteed and where, absent such a release, pursuit of the guarantor by a scheme creditor would undermine the compromise between the creditor and the company."

I take exactly the same view in relation to the relevant provisions of the Plan. They do not present a blot on the scheme or a roadblock.

53. Secondly, my attention was drawn to the creation of an obligation of the Plan Company to make a contribution towards any payment by the Plan Member in respect of the SUNs as if it were a primary obligor. Such a mechanism was not regarded as abusive in *Re AI Scheme* [2015] EWHC 1233 or most recently by Miles J in *Re Swissport Fuelling* [2020] EWHC 1499, at the convening hearing ([2020] EWHC 1499 at paragraphs [42] to [53]) and at the sanction hearing ([2020] EWHC 1773 at [20] to [21]). I do not regard the deliberate creation of such an obligation as presenting a blot upon the scheme or a roadblock in the way of its implementation.

54. Finally, my attention was drawn to the fact that the scheme is dependent upon an international recognition of the modification of rights which arise under New York law under the existing instruments. Here it is proposed that there will be an application for a recognition under chapter 15 of the US Bankruptcy Code. This is entirely conventional. The order includes the means to achieve that end.

55. I have read the evidence of Professor Casey in support of his view that approval under Chapter 15 is most probable, as was the case with the first such scheme under this jurisdiction, the *Virgin Atlantic* scheme.

56. As a footnote, I should observe that I was told as part of the full and frank disclosure process that the Plan is but part of a larger process. I do not consider this is relevant to issues at the convening hearing save insofar as the wider restructuring may present some obvious roadblock which would render putting the proposal to a meeting without point.

57. There are really two matters which may be adverted to shortly. The first is that there is to be an operational restructuring. This itself contains two elements.

58. First of all, the sale to interests associated with Hony Capital of the China Group of trading companies. These are loss-making and have for some while been a drain on the Group's resources. The businesses themselves have a negative value, and they are being disposed of for a nominal consideration. As part of the disposal process, other participants were invited to make bids for the Chinese business, but none was interested. This does not present any difficulties in the way of the consideration (and, if thought fit, approval) of the Plan.

59. The second operational restructuring involves a CVA by the property-holding Group member in order to reduce the rental liabilities of the Group and to shed unwanted venues. This does not present any difficulty in the consideration (and, if thought fit, approval) of the scheme. As I have noted, the CVA itself was dependent on the assurance of new money which is to be provided under the scheme.

60. Apart from the operational restructuring, my attention was drawn to a parallel sales process. This is being conducted under the supervision of an independent financial advisor who has circulated sales material to some 94 potential acquirers of the Group. None has made an indicative offer which produced an outcome that would be better for creditors than that arising under the scheme. The process will continue until the sanction hearing. Its object is to provide clear material as to what the relevant

comparator is to the Plan. Again, this does not present any issues at the convening hearing. It will be considered at the sanction hearing.

61. In these circumstances, I propose to grant the order sought. I would note that amongst the voluminous material provided in support of the Plan is material that is commercially sensitive. I will make an order, frequently made in these circumstances, under CPR 5.4D(2) requiring the Plan Company to be given notice of any request to inspect the court file.

62. I will conclude by saying that I am grateful for the full skeleton arguments of Mr Allison QC and Mr Perkins and for the contribution to the hearing made by Ms Toube QC and Mr Al-Attar. It has enabled me to grapple with matters both novel and complex and to deliver a judgment immediately.

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