Case No: CR-2019-008403

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Neutral Citation Number: [2020] EWHC 382 (ChD)

7 The Rolls Building
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London
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Tuesday, 28 January 2020

BEFORE:

MR JUSTICE TROWER

IN THE MATTER OF:

LECTA PAPER UK LIMITED

Applicant

- and -

MR D BAYFIELD QC, MR R PERKINS and MS S WILKINS (instructed by Linklaters LLP) for the Claimant Company

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JUDGMENT
(APPROVED)

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MR JUSTICE TROWER:

1. This is an application by Lecta Paper UK Ltd (the "company"), which as its name suggests, is incorporated in England and Wales, for an order sanctioning a scheme of arrangement (the "scheme") between the company and certain of its creditors ("scheme creditors") pursuant to Part 26 of the Companies Act 2006 (the "CA 2006").

2. The company is part of the Lecta Group (the "group"), which is the largest manufacturer of speciality and coated wood-free paper products in southern Europe, a business which has been in structural decline over the past decade. The group has taken steps to improve its trading performance, but recently that performance has been weak with significant reductions in net sales and a declining liquidity in the nine-month period ended 30 September 2019.

3. The group is heavily indebted and the evidence justifies a finding that, if the scheme is not sanctioned, the group's working capital facilities are likely to be withdrawn, which will cause the group to run out of money in February 2020, with the consequence that the company and several other group entities will enter formal insolvency proceedings.

4. The company's ultimate parent is a Luxembourg company, Lecta SA (the "parent"). Its interest in the company is held through another Luxembourg company, Sub Lecta SA ("Sub Lecta") and a Spanish company, Torraspapel SA, which is itself the debtor under a fully drawn €65 million revolving credit facility (the "RCF"), the refinancing of which through a new €115 million super senior facility is a separate part of the restructuring of which the scheme itself also forms part.

5. The debt with which this application is concerned is two series of senior secured notes (the "existing SSNs") with an aggregate face value of €600 million, comprising €225 million floating rate senior secured notes due in 2022 issued pursuant to an indenture dated July 2016 and €375 million 6.5 per cent fixed rate senior secured notes due in 2023 issued pursuant to an indenture dated on the same day. Interest totalling some €10 million is accrued and outstanding. The existing SSNs are held through Clearstream and Euroclear and the scheme creditors with whom the scheme is entered into are therefore the beneficial owners of the existing SSNs.

6. The existing SSNs were originally issued by Lecta SA and guaranteed by a number of group companies. The indentures were originally governed by New York law and subject to the jurisdiction of the New York court. In circumstances to which I will come, the company is now a co-issuer of the existing SSNs and the governing law and jurisdiction clauses in the indentures now provide for English law and English jurisdiction.

7. If the scheme comes into effect the whole of Sub Lecta's share capital will be transferred to a New Holdco 1, with a chain of parent companies. The scheme will then release the existing SSNs in consideration for a combination of new senior notes with a face value of €200 million, issued by a New Holdco 2. New junior notes with a face value of €95 million, issued by New Holdco 3 and 95 per cent of the share capital in a new holding company ("TopCo"), to be contractually stapled to the new junior notes. As Mr Bayfield QC, Mr Perkins and Ms Wilkins say in their skeleton argument, the scheme thus involves the conversion of the existing SSNs into new debt instruments with a reduced face value coupled with a partial debt for equity swap.

8. The steps which have been taken to implement the scheme can be shortly stated. A coordinating committee of creditors (the "CoCom") was formed in early September 2019 to negotiate the terms of the restructuring. The key commercial terms were agreed in principle and announced to the market at the end of the month. A lock up agreement was then entered into at the beginning of November, in consideration for which, all signatories who acceded by 29 November and who vote in favour of the scheme are entitled to receive a consent fee. A consent fee will consist of an entitlement to an additional *pro rata* allocation of new junior notes and shares in TopCo, provided out of a pool consisting of new junior notes with a face value of €5 million and five per cent of the share capital of TopCo. The value of this fee has been calculated to amount to between 2.9 per cent and 3.6 per cent of the consideration to be received under the scheme. The fees of the advisors to the members of the CoCom are also being paid. They are thought to amount to approximately 3.6 per cent of the total scheme consideration, but the evidence confirms that they are directly referable to the work they have carried out and the time they have expended in negotiating the scheme and the terms of the new finance documents.

9. All other creditors under the existing SSNs and the RCF were invited to accede to the lock up agreement prior to the launch of the scheme, such that shortly before the convening hearing, some 92 per cent of the beneficial owners of the existing SSNs by value and a significant majority of the lenders under the RCF by value had acceded to the lock up agreement.

10. Meanwhile, on 27 November 2019, the parent, which was still then the sole debtor under the indentures, proposed certain amendments in accordance with section 9.02 of each indenture. The amendments provided for the company to become a co-issuer of the existing SSNs together with the parent, for the governing law of the indentures to be changed from New York law to English law and for the jurisdiction in each indenture to be amended to confer non-exclusive jurisdiction on the English court.

11. The requisite majority of note holders provided their consent to the relevant amendments on 4 December, as a result of which the note trustee entered into a supplemental indenture for each series of the existing SSNs. The company has adduced expert evidence of New York law from Mr Daniel Glosband, which confirms that, to the extent the consents were required from existing SSNs holders, they were validly given by more than 90 per cent of the holders and the supplemental indentures therefore validly amended the indentures in accordance with New York law.

12. At the convening hearing held on 19 December, Zacaroli J made an order convening a single meeting. He gave reasons for his decision. I have read those reasons, from which it is clear that he was satisfied that adequate notice of the hearing was given to scheme creditors and that the class meeting proposed by the company was correctly constituted. He considered questions going to international jurisdiction on the basis there would be no point in the scheme going any further if there was no jurisdiction to sanction it. I shall revert to that issue shortly. Zacaroli J also declared that Andrea Minguzzi had been appointed to be the foreign representative for the purpose of making an application for Chapter 15 relief in the United States.

13. The scheme meeting was held on 23 January 2020. Having considered the chairperson's report and the evidence adduced for the company from Andrea Minguzzi and Victor Parzyjagla, I am satisfied that the provisions of the convening order were

sufficiently complied with. I note in particular that the scheme documents were to be sent by email to the information agent and that this was done on the day of the convening order and that the scheme notices were then sent by email to the corporate action areas for both Euroclear and Clearstream.

14. The outcome of the meeting can be summarised as follows. The scheme was approved by 100 per cent in number of the scheme creditors present and voting at the meeting in person or by proxy. A total of 200 scheme creditors holding claims of in excess of €580 million voted in favour of the scheme. The turnout was very high, with some 96.79 per cent of the total scheme creditors by value voting in person or by proxy. I agree that this can properly be said to be overwhelming support for the scheme.

15. The court's task on an application to sanction is well-known. It was explained by David Richards J in *Re Telewest Communications (No 2) Ltd* [2005] BCC 36 at [20 to 22] and I can simply summarise the relevant part of his judgment as follows. He approved the well-known statement of principle in *Re National Bank Limited*:

> "*In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.*"

16. As for compliance with the provisions of the statute, the court must first be satisfied that what is put before it for sanction under section 899 is a compromise or arrangement within the meaning of section 895, that one party (normally the applicant) is a company as defined and, that the other parties are its creditors or members or a class of them as defined.

17. Subject to a point on international jurisdiction, to which I shall shortly return, it is plain that the company is a company within the meaning of the section, but I should say

something very briefly about the precise identity of the scheme creditors who were summoned to and voted at the scheme meeting and more particularly, why they are creditors within the meaning of the section. As I have already mentioned, they consist of the beneficial owners of the existing SSNs. The reason for this is that like most modern debt securities, the existing SSNs are issued in global form with a global note held by a common depository, in this case, Deutsche Bank, which has a legal right to receive all of the payments in respect of the notes. It holds the global note on behalf of Euroclear and Clearstream, whose participants maintain accounts to which beneficial interests are credited. In addition, a note trustee, in this case Deutsche Trustee Company, has a parallel claim against the company for all amounts payable under the existing SSNs.

18. It follows, that the common depository and the note trustee are creditors of the company in respect of the existing SSNs, but I am satisfied that the beneficial owners of the notes are also creditors of the company, albeit subject to a contingency. This is because section 2.09 of each indenture entitles them to call for the issuance of definitive notes to replace the global notes in certain circumstances, namely where Euroclear or Clearstream are unwilling or unable to act and no replacement is appointed within 120 days or, perhaps more probably, where an event of default is incurred or enforcement action is being taken. In those instances, a direct payment obligation owing by the company to the beneficial of the notes will be generated. This state of affairs is sufficient to render the beneficial owners "creditors", as that word is used in Part 26 of CA 2006, an approach that has been adopted in many other cases in which note holder schemes have been proposed under Part 26, see by way of example *Re Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch) at [23], *Re Co-operative Bank plc* [2013] EWHC 4072 (Ch) at [23] and *Re Noble Group Ltd* [2019] BCC 349 at [161]-[164].

19. In these circumstances, in the present case all the creditors in respect of the existing SSN debt will be bound, but by different mechanisms. The beneficial owners will be the scheme creditors entitled to vote at the scheme meeting. The note trustee will undertake to be bound by the scheme and the common depository will confirm in writing that it will cancel the global notes when the scheme becomes effective. I should add that it was originally intended that the common depository would give an

undertaking, but the waiver provisions will now be exercised in relation to that step, a course, which in my view, is entirely appropriate.

20. It is also plain that the terms of the scheme in the present case are all capable of being characterised as part of a compromise or arrangement between a company and a class of its creditors, as that phrase is used in sections 895 and 899 of CA 2006. The only point which requires very brief consideration relates to releases. The company and the parent are now co-issuers of the relevant debt. The scheme provides for the release and discharge of the scheme creditors' claims under the existing SSNs against not just the company, but also against the parent and all of the guarantors of the existing SSNs who are third parties for this purpose. In my judgment, it is well established that a scheme of arrangement can release claims by a creditor against a third party where such a release is necessary in order to give effect to the arrangement, as the point was put by Patten LJ in *Re Lehman Brothers International (Europe) (No 2)* [2010] Bus LR 489 at [65] a jurisdiction frequently invoked in the context of guaranteed debts, a point further confirmed by Snowden J in his judgment on the sanction hearing in *Re Noble Group Ltd* [2019] BCC 349 at [24].

21. As a matter of principle precisely the same approach is applicable where two companies are jointly liable as co-obligors for the same debt. If this were not to be the case, one of the principal obligors would remain liable for the entire debt, and may be entitled to claim a contribution from the scheme company, a form of ricochet claim that is capable of defeating the purpose of the scheme. Thus, it is now established that in the case of two principal debtors, a scheme proposed by one can effectively provide for a release in favour of both the principal obligors in just the same way as a scheme proposed by a principal debtor can provide for an effective release of claims against a guarantor. This point has been discussed in some detail in see *Re Codere (UK) Ltd* [2015] EWHC 3778 (Ch) at [6]-[7] and *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch) at [18]-[19] and [29].

22. The scheme also releases any claims or purported claims by the scheme creditors against a large number of third parties, including directors, legal advisors, financial advisors and various other intermediaries. This is appropriate and likely to be upheld as part of an arrangement within the meaning of the section, where, as in the present

case, the release is of any claims against the persons involved in the preparation negotiation or implementation of the scheme itself and their legal advisors. Such provision should, of course, be fully disclosed in the explanatory statement, but as a matter of principle, they are well within the scope of the scheme jurisdiction, as Snowden J explained in *Re Far East Capital Limited SA* [2017] EWHC 2878 (Ch) at [13]-[14] In the present case I am satisfied that the terms of the releases are adequately described in the explanatory statement.

23. Turning now to other aspects of compliance with the statute, it is plain that the requisite statutory majorities by number and value were obtained and that the scheme meeting was summoned and convened in accordance with the convening order. I have noted that the documents were not circulated through the clearing systems as was foreshadowed by the evidence at the convening hearing, but the order does not actually provide for that to be done and I am satisfied that the notice of the scheme and how to download those documents was disseminated and the outcome of the voting confirms that adequate notice was in fact given.

24. As to the constitution of classes, I take the view that although the court will need to satisfy itself at the sanction hearing that it has jurisdiction to sanction the scheme, it can be so satisfied where that exercise has already been done at the convening hearing, recognising all the while that it remains open to any creditor, anyway one who has a good reason for not making its points at the convening hearing, to request that class issues be reconsidered at that sanction hearing. This is part of the purpose of the Practice Statement [2002] 1 WLR 1345, responding as it does to the observations of Chadwick LJ *Re Hawk Insurance Company Ltd* [2002] BCC 300 at [21], where he said:

> *"In my view an applicant is entitled to feel aggrieved if, in the absence of opposition from any creditor, the court holds, at the third stage and on its own motion, that the order which it made at the first stage was pointless."*

25. In short, I agree with what Snowden J said in *Re Global Garden Products Italy SpA* [2017] BCC 637 (Ch) at [43], that:

> "*as regards the correct constitution of classes, I accept the point made by Mr Dicker that if a judge has heard full argument at the convening hearing and has decided on the appropriate constitution of classes, it is not ordinarily appropriate for a different judge at the sanction hearing to take a different view of his own motion in the absence of any creditor appearing to contend that the classes were not correctly constituted.*"

I should add that it will obviously not be appropriate to take this course if there has been a material non-disclosure, whether deliberate or accidental, at the convening stage or a relevant change of circumstance. There is no indication that either of those things have happened in the present case.

26. Detailed written and oral submissions were made on the issue of class composition at the convening hearing. Zacaroli J, having considered those arguments held that a single scheme meeting should be convened and recorded his reasons for doing so. No one appears before me today to say that he is wrong and I propose simply to adopt what had already been decided and declare myself satisfied that the meeting in this case was properly constituted. I should add, albeit technically by way of parenthesis, that what Zacaroli J had to say on the questions of interest rates, maturity dates, consent fees and retail holders as those questions affect class issues, seems to me to have been quite obviously correct.

27. I now turn to whether the class was fairly represented by the meeting and whether the majority acted *bona fide* and were not coercing the minority in order to promote an adverse interest and I can deal with this quite shortly. The scheme creditors who voted in favour represented some 96.79 per cent of the total scheme creditors by value and included a number who did not sign the lock up agreement (some 31 holding approximately €23 million of the existing SSNs by value). The turnout of 96.79 per cent was on any view very high and these are powerful considerations in support of a conclusion that this part of the statutory test is satisfied.

28. It has been drawn to my attention that one of the scheme creditors, Natwest, will also be providing the new facility agreement as part of the wider restructuring and one of the other lenders under the existing RCF, Credit Suisse, is affiliated to various scheme

creditors. I am satisfied that these potential cross-holding issues are so minor, amounting as they do to less than 10 per cent of the debt, that they could not create any fairness issues in the context of the votes that were in fact cast, even if it were to be the case that there was in fact any divergence of interest being promoted thereby. The evidence confirms that the company is not aware of any other special interests.

29. As to whether the scheme is one which a creditor could reasonably approve, the starting point is that the overwhelming majority of scheme creditors have in fact approved it, and that is a powerful factor when considered in the context of the approach that I am required to adopt. In any event, I am satisfied the scheme is fair. The evidence demonstrates that insolvency is a significant likelihood if the scheme is not approved, that the comparator to the scheme is a formal insolvency proceeding and the scheme will provide each scheme creditor with a substantially better return than it would receive in formal insolvency proceedings. As to the latter point, I have considered part 7 of the explanatory statement which concludes, based on the advice of Deloitte, that the return to scheme creditors will represent between 17 per cent and 42 per cent of their claims, while what is described as the going concern valuation intended to reflect the value of the new debt and its equity instruments will be likely to provide a return representing between 66 per cent (low case) and 90 per cent (high case) of their claims. The figures speak for themselves. I also agree with Mr Bayfield that the fact that creditors will be owning a significant equity stake, some 95 per cent of the company subsequent to the scheme, is itself a significant factor in the fairness considerations.

30. I am also satisfied that the scheme creditors have been properly consulted by the company having regard to the way in which it has communicated with scheme creditors, both before the deadline for the signing the lock up agreement and subsequent to the date of the convening hearing. As to the latter, I am satisfied that the explanatory statement was full and clear in its terms.

31. I have also had regard to two further matters, both of which are capable of going to the fairness of the scheme and both of which were dealt with in the convening skeleton in relation to class issues, namely fees and the substance of the arrangements for dealing with retail holders. In both instances no creditor appears today to criticise those parts

of the scheme, but it is appropriate for me to say this. As to fees, I accept that the fees in this case, both for adhering to the lock up agreement and for assisting in the preparation of the scheme as members of the CoCom, have been set at such a level and have been designed in such a way that they were not inherently unfair. I have already mentioned the percentages and I have considered the disclosure that was made in the evidence. I should stress, however, that the issue of fees is particularly fact sensitive, and the same conclusion may not be reached in other cases where similar levels have been set.

32. As to the position of retail holders, they will not be eligible persons entitled to receive scheme consideration for regulatory reasons. Therefore, clause 4 of the scheme makes provision for the new notes and TopCo shares to be received by a nominated recipient on their behalf. This is a well-established mechanism for distributing scheme consideration to creditors where regulatory rules make a direct distribution more difficult. With the assistance of Mr Bayfield, I have been through the mechanisms which the scheme provides and I am satisfied that the provisions which have been included and in particular, the role of the of the holding period trustee, are fair and reasonable.

33. I now turn to the question of international jurisdiction and recognition, which includes a short point on fairness as well. Part 26 of the Companies Act applies to a company, which means a company liable to be wound up under the Insolvency Act, see section 895(2)(b) of CA 2006. Because the Recast Insolvency Regulation does not apply directly to schemes of arrangement, it does not restrict the meaning of company under section 895, a point that was decided by Lewison J in *Re DAP Holding NV* [2005] EWHC 2092 (Ch) at [9]-[10]. Accordingly, any company incorporated in England and Wales is, for these purposes, liable to be wound up in England and Wales.

34. In the case of a foreign company, a sufficient connection with this jurisdiction is required and will be established if the liabilities compromised by the scheme are governed by English law, a point discussed in a number of cases, including in particular *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433 at [6]-[9]. Even if the scheme liabilities are governed by foreign law, a sufficient connection will be established if the foreign company proposing the scheme has its COMI in England and

the scheme is also found to be capable of recognition in the relevant key foreign jurisdiction: *Re Magyar Telecom BV* [2014] BCC 448 at [18]-[25].

35. In the present case, the company is incorporated in England and Wales and the existing SSNs are governed by English law and subject to the jurisdiction of the English court. There is no need to establish any further connection. However, shortly before the scheme was proposed, the sole debtor was the parent, which is incorporated and has its COMI in Luxembourg, and the existing SSNs were governed by New York law. As I have already described, a structure was then devised by which the company became a co-issuer and the governing law of the existing SSNs was changed. The reason this was done was to avoid the issue of whether a sufficient connection existed. In his judgment at the convening hearing Zacaroli J said that this was a matter which might require further consideration at this sanction hearing.

36. In my judgment, the steps which were taken by the company in this case were permissible and do not give rise to fairness issues. Similar steps have been taken in a number of recent cases to which I have been referred: *Re Magyar Telecom BV* [2014] BCC 448, *Re Noble Group Ltd* [2019] BCC 349 and *Re APCOA Parking Holdings GmbH* [2015] Bus LR 374 being three of them. In *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch), Newey J summarised the position in a passage with which I agree:

> "*In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping*."

The most recent case in which this type of procedure has been devised is *Re NN2 Newco Limited* [2019] EWHC 1917 (Ch), a case in which, like the present case, the structure involved an English company within the group acceding to the notes as a co-issuer and the governing law of the notes then being changed from New York law to English law.

37. Like Norris J in *Re NN2 Newco*, I am satisfied that in the present case the structure that has been devised involves good forum shopping, as that phrase was used by Newey J in *Re Codere*, designed to produce the best possible outcome for the creditors as a whole. This conclusion is consistent with the analysis of Zacaroli J in the convening judgment, with which I agree. I should also add that one of the important factors in the present case is that steps which might otherwise be open to challenge, were taken with the support of the vast majority of the scheme creditors and in accordance with the note instruments to which they were all party.

38. Where, as in the present case, a sufficient connection is achieved by the introduction of another co-debtor with an English incorporation or COMI and/or by the change of the governing law, it will also be relevant that those changes are effective under the law governing the relevant instrument at the time of the change. In the present case I am satisfied by the evidence adduced from Mr Daniel Glosband, a New York law expert, that the amendments to the indentures to introduce a new co-debtor to change the governing law from New York law to English law and to introduce an English jurisdiction clause were effective in accordance with their terms.

39. There are other aspects to effectiveness, with which I should also deal, but they relate to the recognition of the effectiveness of the scheme more generally. As David Richards J said in *Re Magyar Telecom BV* [2014] BCC 448 at [16], the court will not generally make any order which has no substantial effect and before the court will sanction a scheme it will need to be satisfied that the scheme will achieve its purpose. I agree with the company's submission that this issue should normally be addressed at the sanction hearing, because the concept of substantial effect goes to the exercise of the court's discretion even if preliminary consideration was given at the convening stage. I also agree that the starting point is that, because the existing SSNs are now governed by English law and subject to the jurisdiction of the English court, it is inherently likely that the scheme will be recognised abroad, a point clearly made by David Richards J in *Magyar* at paragraph 15 of his judgment.

40. I have considered the expert evidence as to whether the scheme will be recognised in Luxembourg, Spain, Italy and France and am satisfied that each of the relevant experts has expressed the opinion that the scheme would be recognised in their respective

jurisdictions. It is not necessary for me to go through the reasoning of each of the experts one by one, but it suffices to say that I have read their reports and they deal with the application of the Recast Judgments Regulation, their own domestic principles of private international law and recognition of foreign judgments and the application of the Rome I Regulation. In my judgment, the company has satisfied the evidential burden of showing that the scheme is likely to have substantial effect because it is likely to be recognised in each of the relevant jurisdictions.

41. I should just mention Brexit. The Recast Judgments Regulation will continue to apply to the recognition of an English judgment in EU member states, notwithstanding the occurrence of Brexit, provided that the judgment has been given in proceedings which were instituted before 31 December 2020, being the end of the transition period. This follows from Article 67(2) of the Withdrawal Agreement. It follows that any sanction order made in this case should be recognised in EU member states, pursuant to the Recast Judgments Regulation, as will their own domestic law dealing with the recognition of judgments. It is also the case that the application of the Rome I Regulation ought to be unaffected by Brexit in any event. As I read the expert reports, they each confirm that that Regulation will continue to apply after the end of the transition period so that the law of the jurisdiction in respect of which they give evidence will recognise the governing law of the relevant contracts, in this case English law, as applying to the variation and discharge of rights under that contract.

42. In addition, the company is required by clause 8.1.4 of the scheme to apply for the scheme to be recognised under chapter 15 of the US Bankruptcy Code. An application for recognition as a foreign main proceeding has already been made and is due for hearing tomorrow. The evidence from Mr Glosband, who has produced a comprehensive report on the matter, is that the US Bankruptcy Court is likely to grant that relief, including I note, an opinion that the US court will give full force and effect to the scheme and in particular to the third party releases for which it provides. This will provide further comfort that the scheme will be effective in the jurisdiction whose laws formerly governed the existing SSNs. This clause is capable of being waived as it was in the scheme sanctioned by David Richards J in *Magyar* and I am satisfied that it is appropriate for that to be done if that is what occurs. It is not a case in which there is

any significant question over recognition so as to make it desirable to make the requirement non-waivable.

43. In all the circumstances, I am satisfied that the scheme is likely to be effective in the jurisdictions in which it matters.

44. The company has also made submissions as to whether the court must be satisfied that it has jurisdiction over the scheme creditors pursuant to the Recast Judgment Regulation, which applies in civil and commercial matters. It has been established that an application to sanction a scheme of arrangement is a civil or commercial matter, but it has never been conclusively determined whether the Article 4(1) rule that any person domiciled in an EU member state must be sued in the courts of that member state, applies to schemes of arrangement, although the matter has been debated in a number of cases including *Re Rodenstock GmbH* [2012] BCC 459 at [47]-[63], *Re Magyar Telecom BV* [2014] BCC 448 at [28]-[31] and *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 at [41]-[45] among many others.

45. I shall adopt what has become the usual practice of assuming without deciding, that Chapter II of the Recast Judgments Regulation applies to this application on the basis that the scheme creditors are sued by the company and, that they are defendants to the scheme application. If on the basis of that assumption the court has jurisdiction, because one of the exceptions to Article 4 applies, then there is no need to determine whether that assumption is correct and I will not do so.

46. In the present case the company relies on Article 25 and Article 8 of the Recast Judgments Regulation and its submissions in this regard were accepted by Zacaroli J, anyway, on a provisional basis in the convening judgment.

47. As to Article 25(1), I am satisfied that the indentures now confer non-exclusive jurisdiction on the English court in relation to any proceedings commenced by the parent, the company, the note trustee and the holders of the existing SSNs. I am also satisfied, as was Zacaroli J, that the consequence of this is that Article 25(1) applies and the court has jurisdiction in respect of the scheme for that reason. As Norris J said in *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch) at [41]:

> "*By its own terms Article 25 covers both exclusive and non-exclusive agreements. For completeness I would add that (on the footing that schemes are within the scope of the Recast Judgments Regulation) an application to the Court for approval of a scheme in my view constitutes a "dispute" for the purposes of such a jurisdiction clause. If the Regulations are to be read as extending to schemes, then contractual provisions obviously designed to engage with the Regulations must be read in accordance with the same interpretative approach*."

48. As to Article 8, a defendant who is domiciled outside England may be sued in England, provided that another defendant in the same action is domiciled in England and, provided that it is expedient to hear the claims against both together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The consequence of this is that if at least one scheme creditor is domiciled in England, then Article 8(1) confers jurisdiction on the English court to sanction a scheme affecting the rights of creditors domiciled elsewhere in the EU see *Re DTEK Finance plc* [2017] BCC 165 (convening) and [2016] EWHC 3563 (Ch) (sanction), in which all of the authorities are cited and considered at length. I should just mention that there has been some debate as to whether in determining whether Article 8(1) applies, the court is required to consider whether the numbers and size of the scheme creditors domiciled in the UK are sufficiently large: *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 (Ch) at [51]. I prefer the approach of Newey J and Norris J in *Re DTEK*, that this is not necessary for the purely jurisdictional purpose of assessing whether Article 8 is engaged.

49. The evidence is that scheme creditors holding 4.3 per cent of the existing SSNs are domiciled in England. The inference of domicile here is, in my view, established by the fact that they had both their statutory seats and principal places of business in the UK. Accordingly, I consider, as did Zacaroli J, that the requirements of Article 8(1) are satisfied and the court has jurisdiction in respect of the scheme on that ground as well.

50. Finally, the company also seeks to exercise the power given by clause 8.13 of the scheme to make any modification to the scheme that the court may think fit to approve

at the sanction hearing, provided that it could not reasonably be expected, directly or indirectly, to have a material adverse effect on the interests of any scheme creditor. There are three provisions, which I am asked to consider. The first is a minor administrative change to the escrow arrangements for repaying the RCF. I am satisfied that this modification is appropriate, and in any event it only affects the position of the RCF lenders. The second is the deletion of all references to the TopCo assignment agreement. The rationale for this, as explained to me by Mr Bayfield in his submissions is that it is now thought that the inclusion of the references to the TopCo assignment agreement are unnecessary and indeed potentially flawed. They might have certain adverse CA 2006 (and possibly tax) consequences in relation to the shares being issued at a discount. The issue was first raised by the CoCom's legal advisors and there has subsequently been agreement between the CoCom and the company's legal advisors that everyone's assessment of the potentially adverse consequences means that it is no longer appropriate for any reference to be contained in the scheme. I am content that the requirements of clause 8.13 of the scheme are satisfied in relation to those modifications as well. The third is a very minor modification, which is the correction of an erroneous description of the parties in the definition of the English deed of release, which is simply a drafting error that I am content to see corrected by the modification proposed.

51. In summary, I am satisfied the company has consulted with the advisors to the CoCom in respect of each of these amendments and that each can be made without any adverse effect on the interests of any scheme creditor and that it is accordingly appropriate to approve those modifications in accordance with the terms of the scheme.

52. Taking all those factors into account, in my judgment this is a scheme which it is appropriate for the court to sanction. I shall therefore make an order in the form which has been put before me. I should just mention that paragraph 2 of the terms of the order provides for a particular date by which the scheme is to be delivered to the Registrar of Companies. Mr Bayfield has explained to me that this is to facilitate the situation in relation to recognition in the United States and I am content to make an order in those terms.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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