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Case No: CR-2020-004615

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

IN THE MATTER OF GATEGROUP GUARANTEE LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

7 Rolls Building
Fetter Lane
London, EC4A 1L

Date: 30th March 2021

Before:

MR JUSTICE ZACAROLI

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Felicity Toube QC and Dr Riz Mokal (instructed by **Clifford Chance LLP**) for the **Applicant Company**

Hearing date: 26 March 2021

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APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30 am on 30 March 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. On 26 March 2021 I made an order sanctioning a restructuring plan (the "Plan") under Part 26A of the Companies Act 2006 in respect of gategroup Guarantee Limited (the "Company"). These are my reasons.

2. This judgment is intended to be read together with my judgment dated 17 February 2021 (the "Convening Judgment"), in which the relevant background to the Company, the Plan and the reasons for convening meetings of two classes of creditors are set out in detail. I adopt the same abbreviations and definitions as used in the Convening Judgment.

3. The matters to be considered on an application to sanction a Plan where (as here) no question of cross-class cram down arises are the same as those that arise on an application to sanction a scheme of arrangement under Part 26 of the Companies Act 2006: see, for example, *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch), per Snowden J at [45]-[46].

4. In order to sanction a Plan, the court must be satisfied that it has jurisdiction both in relation to the jurisdiction of this court in an international sense and in relation to the composition of classes. Both issues were considered at length in the Convening Judgment with the benefit of a full written argument from Bondholders who had, until shortly before the hearing, opposed the Plan. I concluded that this court had jurisdiction over the Company on the basis that it was incorporated here and that proceedings under Part 26A fall outside the scope of the Lugano Convention. I also determined that it was necessary to convene separate meetings of the Senior Lenders and the Bondholders. No creditor has sought to challenge those conclusions and, in accordance with the usual practice of the court, therefore, I need not revisit them on this application.

5. Aside from the question of jurisdiction, the matters for consideration on an application to sanction a Scheme or Plan are as follows (see *Re Telewest Communications plc (No.2)* [2005] BCLC 36, per David Richards J at [20]-[22]; *Re Noble Group Limited* [2019] BCC 349, per Snowden J at [17]):

   (1) The Court must consider whether the provisions of the statute have been complied with;

   (2) The Court must consider whether each class was fairly represented by the meeting, and whether the majority was coercing the minority in order to promote interests which are adverse to the class that they purported to represent;

   (3) The Court must consider whether the scheme or plan was a fair one which a creditor could reasonably approve; and

   (4) The Court must consider whether there is any "blot" or defect in the scheme or plan.

6. In addition, the court needs to be satisfied that the Plan will achieve its purpose. Where there is a significant international element, that includes being satisfied that the Plan will be effective in those foreign jurisdictions where its recognition is of practical importance: see *re Magyar Telecom BV* [2014] BCC 488, at [16]; *Re Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch), at [17]-[26]. Of particular relevance, in light of the co-obligor structure adopted by the Company in this case, is the effectiveness of the Plan under Swiss law (which governs the Bonds) to vary the terms of the Bonds as between the Bondholders and the Issuer.

7. The class meetings were duly convened and held in accordance with the order made at the convening hearing. The evidence produced on this application demonstrates that the meetings – although held virtually by reason of the ongoing Covid-19 pandemic – gave creditors an effective opportunity to participate.

8. The statutory majorities were easily achieved. The Senior Lenders voted unanimously to approve the Plan. Bondholders representing 98.41% in number and 99.98% by value of those voting approved the Plan.

9. Turnout among the Bondholders was low. This is relevant to the second matter to be considered: whether the vote was representative of the class. The low turnout of Bondholders was expected in light of the fact that the Bonds are predominantly held by retail investors. This was the very reason that a Part 26A plan was considered the only possible route to being able to restructure the Bonds, in light of the stringent quorum requirement pursuant to the terms of the Bonds for a resolution of the Bondholders to amend the terms of the Bonds.

10. I am nevertheless satisfied that the turnout – at 24.52% by value (represented by 66 different Bondholders) – was sufficiently representative of the class. I take into account the extensive efforts made to ensure Bondholders had notice of the meetings. There is no reason to think that any Bondholder voting in favour of the Plan had any interest, adverse to or different from the class as a whole. I therefore have no reason to conclude that the vote was obtained by coercion of the minority.

11. This is plainly a Plan that a reasonable and honest member of the class of Bondholders could approve. As explained in the Convening Judgment, the alternative to the Plan would be an insolvency process which would see Bondholders recover only a small fraction of the value of the Bonds. The Plan, on the other hand, does no more than extend the maturity date of the Bonds and waive an event of default arising from a change of control, ensuring (at the very least) the chance that the Bondholders get paid the capital value of the Bonds in full, in return for a continuation of interest payments in the meantime.

12. As to there being a blot on or defect in the Plan, the only issue to consider is one which I flagged in the Convening Judgment (at [176]), namely the question whether the artificiality of the co-obligor structure adopted in order to engage the jurisdiction of this court to sanction the Plan is such that the court ought to exercise its discretion against sanctioning it.

13. The Company fully accepts that the motivation for its creation and interposition in the Group's borrowing arrangements was solely to enable the use of the English court's restructuring plan jurisdiction. I dealt with the reasons why that did not create a jurisdictional hurdle in the Convening Judgment, but pointed out (at [171]) that there may well be cases where such a structure overrode legitimate interests of creditors in a way which was wholly objectionable.

14. I also noted at [174] of the Convening Judgment, however, that "it is possible to envisage a case where the artificial structure is the only solution to enable a restructuring to be effected, all other possible alternatives having been explored and rejected for one or other reason of law or practicability; where the alternative is a value-destructive liquidation; and where the terms of the restructuring demonstrably benefit the affected creditors. In such a case, there would be a powerful argument that the artificiality of the structure should not prevent the company and its creditors being able to take advantage of the English scheme or plan jurisdiction."

15. I am satisfied that this is just such a case, for the following reasons.

16. First, the Company and the Group are in serious financial difficulties which means that, absent the restructuring, the Bondholders would receive only a fraction of their debts in the inevitable insolvency proceedings that would follow. The Senior Lenders would also be seriously impaired.

17. Second, the benefit of the wider restructuring of the Group, which includes the shareholders providing CHF 500 million of new money, can only be obtained if the necessary extension of facilities is achieved among all relevant stakeholders, including the Bondholders. All stakeholders other than the Bondholders have agreed.

18. Third, as to the Bondholders, it is simply not feasible to obtain full agreement or even sufficient agreement to be able to operate the amendment provisions in the terms of the Bonds (because of the quorum requirement).

19. Fourth, after investigating the options, the Company has reasonably concluded that there is no other restructuring procedure, in Switzerland or Luxembourg, by which the term of the Bonds could be extended. The Plan represents the only route for avoiding an insolvency process of the Group which would be highly damaging for all stakeholders of the Group, including all creditors of the Company.

20. Fifth, as noted above, the impact of the restructuring on the Bondholders is minimal, in that it involves no impairment of their rights other than an extension of maturity (in return for which they continue to be paid interest) and the waiver of a change of control provision, essential to enable the wider restructuring to proceed.

21. Sixth, to the extent that this may be seen as forum shopping, that has to be seen in the context that, while the Issuer is incorporated in Luxembourg, its COMI has in fact been relocated to England, so the co-obligor structure is not being used in order to give this court jurisdiction over the Issuer that it would not otherwise have.

22. Seventh, also to the extent that it may be seen as forum shopping, for the first five reasons already given this case undoubtedly falls into that class of "good forum shopping" cases as identified by Newey J in *Re Codere* [2015] EWHC 3778 (Ch), at [18] to [19]: the co-obligor structure is being used here, not to enable a debtor to exploit for its own advantage, and at the expense of a creditor class, the insolvency laws of a particular jurisdiction, but with a view to achieving the best possible outcome for all.

23. In considering the international effectiveness of the Plan, the principal jurisdiction to consider is Switzerland, as the Bonds are governed by Swiss law. It is also necessary to consider the position in Luxembourg, as the place of incorporation of the Issuer (albeit that – as I explain below – its centre of main interests ("COMI") has been relocated to England).

24. The Company produced evidence from an expert in Swiss law, Professor Rodrigo Rodriguez. His opinion is that the Plan would be regarded as an insolvency proceeding so as to be excluded from the Lugano Convention (consistent with the decision I reached in the Convening Judgment). He considers it would be classified as a composition or similar proceeding within Article 175 of the Swiss Private International Law Act ("SPILA"). By Article 166 of SPILA, six conditions for recognition are set out:

(1) That the decision is enforceable in the state of origin (Article 166 (1)(a));

(2) That no lis pendens (same matter pending) or res judicata (same matter already decided) objections exist (Article 166 lit. b and 27(2)(c));

(3) That the proceedings did not violate the basic procedural rights of the parties bound by it, in particular the right to be heard (Articles 166(1)(b) and 27(2)(b));

(4) That the parties have participated in the proceedings or have at least been duly summoned to participate in accordance with applicable treaties and regulations (Articles 166(1)(b) and 27(2)(c));

(5) That the decision to be recognized was issued by a court in the State of either the registered seat or the COMI of the debtor – provided the debtor is not registered in Switzerland (Article 166(1)(c)); and

(6) That the decision is not manifestly contrary to Switzerland's ordre public (Articles 166(1)(b) and 27 (1)).

25. Professor Rodriguez assumes in his evidence that the first three conditions are satisfied. I consider that they are: the Plan is enforceable in this jurisdiction, I am aware of no other proceedings pending or decided so as to give rise to res judicata and all creditors were afforded the right to be heard both at the convening hearing and the sanction hearing.

26. He concludes that the remaining conditions are satisfied. As to the fifth condition, there is no difficulty so far as concerns recognition of the Plan insofar as it affects the rights of the Bondholders as against the Company, since the Company is incorporated in England. Moreover, insofar as it is relevant to consider this condition in relation to the Issuer, it is satisfied provided that the Issuer has successfully moved its COMI to England (which, as I explain below, it has).

27. A potential issue arises, however, from Professor Rodriguez's supplemental opinion, which addressed the question whether under Swiss law the terms of the Bonds of a disclaiming Bondholder had been amended in the same way as the terms of the Bonds of the non-disclaiming Bondholders. (This question arose from one of the objections raised by the Bondholders who opposed the Plan until shortly before the convening hearing). Professor Rodriguez said:

> "the position in Swiss law would be that the terms of the Bonds held by [the objecting Bondholders] would also be amended in the same way as the participating Bondholders who had not disclaimed the Deed Poll, in each case as provided for under the Plan sanctioned by the English court…"

28. This passage appeared to assume that the effect in English law of the Plan, without more, was to effect an amendment to the terms of the Bonds.

29. There is authority in the CVA context that a scheme of arrangement of the company's affairs under s.1(1) of the Insolvency Act 1986 is not capable of directly effecting an amendment to the rights as between the company's creditors and third parties: see *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch), per Etherton J at [47] to [53].

30. In a domestic context, that is usually not a problem because the scheme has practical effect by reason of the fact that the creditors' promise in the scheme to release or vary rights of third parties is binding as between them and the company and can be enforced by the company.

31. This point having been raised with the Company, a supplemental report from Prof Rodriguez was provided (on a very short notice basis) in which he said he was confident that if the Bonds are actually amended by virtue of the Plan, there would be no difficulty in the Swiss court recognising the Plan's effect in amending the Bonds as against the Issuer. If, however, the Plan was only effective "in personam" against the Bondholders, then the Swiss judge called upon to enforce or recognise the Plan would be faced with "an additional

particularity". He concluded that it was more likely than not that the Swiss court would still give effect to the Plan as a defence to an action brought by a Bondholder against the Issuer, but the position was less clear. So far as the same question arose in the context of a claim by a Bondholder against the Parent (as guarantor of the bonds), Professor Rodriguez felt unable to answer the question with any certainty, on the assumption that the Plan did not actually effect an amendment to the Bonds.

32. The question of *how* the Plan is effective to amend the terms of the Bonds is therefore of some importance in the context of analysing its effectiveness in Switzerland. Put another way, the question is how (and by whom) the Plan could be enforced against – or raised as defence to a claim brought by – a Bondholder in Swiss proceedings (for example if a Bondholder sought repayment in full in respect of its Bonds on or after the original maturity date).

33. Ms Toube QC and Dr Mokal filed a supplemental note addressing this point, in which they sought to distinguish a CVA from a Plan, partly by reference to the different statutory wording, and partly by reference to case law in the context of Schemes.

34. As to the wording, they pointed to the fact that a CVA comprises a proposal by a company for a scheme of arrangement "of its affairs", whereas a Scheme or a Plan is a compromise or arrangement (without reference to "its affairs") between a company and its creditors. I am doubtful that the distinction in language is sufficient to make a difference. A Scheme or Plan (like a CVA) is an arrangement that exists between the Company and its creditors and is binding <u>as between them</u> because of the approval by creditors and the sanction of the court (see the reference to *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271 in the Convening Judgment at [90]).

35. As for the authorities, it is true that in the leading case on the point, *Re T&N Limited* [2006] EWHC 1447 (Ch), David Richards J referred at [53] to a Scheme being within the statute if "its effect is to alter the rights of creditors against another party". He was not dealing there, however, with the question how that effect was to be achieved.

36. In *Re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161, Patten LJ, at [50] to [52] referred to the Australian decision of *Re Opes Prime Stockbroking Ltd* [2009] FCAFC 125, in which reference was made to there being nothing to prevent a company posing a term to the effect that <u>creditors will</u> discharge debts of, for example, sureties. At [63] he referred to it being entirely logical to regard the court's jurisdiction as extending to approving a scheme where the <u>creditors were required</u> to bring into account and release rights of action against third parties. This language is not supportive of the view that the scheme can – automatically – alter those rights: instead it is supportive of the view that the scheme can impose obligations on the company's creditors to do so. It is true that the Master of the Rolls at [83] referred to a scheme in which statutory rights which creditors of the company enjoyed against insurers "could be varied". He – too – however was not concerned with the juridical basis on which that could be achieved.

37. In fact David Richards J did address this point in *T&N* at [55], in the following terms:

> "Mr Chivers also submitted that a compromise of the rights of the EL Claimants against the EL Insurers cannot be achieved by a scheme of arrangement between T&N and the EL Claimants. The binding effect of the court's sanction to the scheme applies only to the parties to it, that is, T&N and the EL Claimants. While this latter point is correct, it does not establish the first point. There are mechanisms regularly used whereby a third party can be bound by and obtain the benefit of a scheme. In a typical scheme to effect a merger or takeover, the members' obligation to transfer their shares will be enforceable through the appointment of an attorney to sign the share transfers, and for its part the acquirer will undertake to the court to be bound by the scheme and can therefore be obliged to give effect to it. Likewise, in this case the EL Claimants are obliged to assign to the trustee the benefit of their claims against the EL Insurers and the fruits of any action, and authority to effect the assignment, if necessary, is conferred by the scheme on an attorney. Their covenant not to make claims against the EL Insurers is enforceable by T&N."

38. As that passage shows, a Scheme or Plan is capable of effecting a variation in rights as between non-assenting creditors and third parties – and (I would add) of enabling the third party to benefit from and enforce covenants to that effect within the Scheme or Plan, provided the appropriate mechanism is in place. The two mechanisms envisaged in *T&N* were: (1) the appointment, as a term of the Scheme, of an attorney on behalf of the creditors to do the thing that the scheme obliges them to do; and (2) a covenant by the creditor in favour of the company, to release or alter rights as against a third party, which is enforceable by the company against its creditors, including non-assenting creditors, following sanction of the Scheme.

39. In this case, as currently drafted, the Plan does not contain the first of those mechanisms. Clause 4.3 states: "Immediately upon the delivery of the Restructuring Conditions Satisfaction Notice to the Notice Parties, the amendment and waiver to the Bond Terms set out in Schedule 1 shall take effect, without any further action required to be taken by any Plan Creditor or any other person." The amendments in Schedule 1 simply extend the maturity date and waive the change of control provision referred to above.

40. In order to address this concern, the Company proposed an amendment to the Plan. With a slight modification to the language, following an exchange with Counsel after the hearing, the amendment adds at the end of clause 4.3:

> "The Company is hereby appointed on behalf of the Bondholders to take whatever steps (if any) as may be necessary (including as a matter of Swiss law) to implement the amendment and waiver to the Bond Terms set out in Schedule 1".

41. The Company is entitled, by clause 7.4.1 of the Plan, to consent on behalf of all Plan Creditors to any modification of, or addition to, the Plan which the Court may think fit to impose and which is necessary for the purpose of implementing the Transaction, including those of a technical or administrative nature, which could not reasonably be expected directly or indirectly to have a material effect on the interests of any Plan Creditor. The modification referred to above falls within that category.

42. If it does become necessary for the Company to take action under this additional wording, since it is appointed to do so by the terms of the Plan (as amended), the source of the amendment nevertheless remains the Plan itself. It is the Plan that imposes the obligation to amend the Bonds and provides the mechanism by which that is to be achieved in the case of a non-assenting Bondholder.

43. The position so far as enforcement in Luxembourg is concerned is more straightforward. The Company filed an expert opinion of Philippe Hoss. He considers that the plan would be considered an insolvency proceeding under rules of Luxembourg private international law (the EU Insolvency Regulation being inapplicable, because Part 26A is not within its Annex 1). Luxembourg law would recognise the plan if the following conditions are satisfied:

(1) the court that has rendered the insolvency judgment had jurisdiction in accordance with Luxembourg international private law;

(2) the proceeding leading to the judgment was valid (i.e. conducted with proper and due process);

(3) there is no fraud;

(4) the decision is not contrary to Luxembourg international public order; and

(5) the decision is not contrary to an existing Luxembourg court order.

44. Mr Hoss' opinion was that these were satisfied. Satisfaction of the first condition depended upon the COMI of the Issuer having been moved to England. The steps taken by the Issuer to move its COMI include the following: (1) it established a new office at, and moved its principal place of business to, London; (2) it has appointed new directors, so that it has a majority of UK resident directors; (3) all board meetings have, since the date of the move, been held in England; (4) it has notified HMRC of its UK tax residency; (5) it has submitted documents to Companies House in England and Wales for registration as a branch of an overseas incorporated company; (6) it has an active bank account in England; (7) it has taken numerous steps to notify creditors of the change in its COMI, including issuing a notice to the Bondholders; and (8) communications with Bondholders have taken place from England, including a videoconference from London, and in each written communication the Issuer's new address and change of principal place of business have been stated. Given the very limited nature of the Issuer's business, I consider that these steps were sufficient to effect a change in its

COMI, in accordance with the principles recited, for example, in *Re Videology* [2018] EWHC 2186 (Ch).

45. For the above reasons, I was satisfied that it was appropriate to make an order sanctioning the Plan.