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Case No: CR-2019-004856

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES LIST (ChD)

Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 31/07/2019

Before:

MRS JUSTICE FALK

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IN THE MATTER OF SYNCREON GROUP B.V.
IN THE MATTER OF SYNCREON AUTOMOTIVE (UK) LTD

AND IN THE MATTER OF THE COMPANIES ACT 2006

Mark Arnold QC and **Adam Goodison** (instructed by **Weil Gotshal & Manges (London) LLP**) for **syncreon**

Hearing date: 25 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

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1. These are my written reasons for granting an application by Syncreon Group BV ("syncreon Group") and Syncreon Automotive (UK) Ltd ("syncreon UK") for an order pursuant to section 896 of the Companies Act 2006 convening meetings of certain classes of creditors for the purpose of considering, and if thought fit approving, schemes of arrangement proposed to be made pursuant to Part 26 of the Companies Act 2006 ("the Schemes"), and related directions and orders. I made the order in broadly the terms requested at the hearing on 25 July.

2. Syncreon Group is a private limited company incorporated under the laws of the Netherlands. Syncreon UK is a company incorporated in England and Wales. Both are held directly or indirectly by a further Dutch company, syncreon Group Holdings BV ("Parent"). I shall refer to the group headed by the Parent as the "Group". There is a further ultimate parent of the Group, called syncreon Global Holdings Limited.

3. The Group carries on the business of specialised contract logistics in the automotive and technology industry. The Group considers that it is significantly over-leveraged and is unlikely to be able to continue in business without restructuring its debt, and that the likely alternatives are enforcement action leading to an accelerated sale or piecemeal insolvency procedures. The Schemes form a key part of the proposed restructuring.

4. The Schemes relate to debts owed under a Parent Credit Facility ("PCF") dated 28 October 2013 and debts owed under a Notes Indenture dated 23 October 2013 (the "Notes"). The Notes are traded through the Depositary Trust Company (DTC). There have been defaults under both the PCF and the Notes. Syncreon Group is the principal borrower under the PCF and the debt is guaranteed by certain other members of the Group, including syncreon UK. The PCF debt is also secured. The principal amount outstanding pursuant to the PCF is approximately US$680m, comprising amounts due under term loan and revolving credit facilities. Syncreon Group is also the Note issuer, and has issued US$225m of Notes, held in global registered form by DTC. References to Noteholders below are to persons with beneficial interests in the Notes. Like the PCF, the Notes are guaranteed by certain other Group members including syncreon UK, but unlike the PCF the Notes are unsecured.

5. Under the proposed restructuring, the PCF debt would be released in exchange for restated debt of US $225m (referred to as "Second Out Term Loans") owed by syncreon Group and 80% of the equity in a new Dutch parent company ("Newco"), and the Notes would be released and exchanged for a 4.5% interest in the equity of Newco together with warrants representing the right to acquire 10% of such equity. The Group estimates that as a result (and taking account of the additional lock-up amounts referred to below) the PCF lenders could receive between 59% and 72% of the principal amount of the debt, as compared to between about 11% and 45% in the event of an accelerated sale or insolvency procedures, and that Noteholders could receive between 7% and 10%, as compared to 0% to 0.81% in the event of an accelerated sale or insolvency procedures.

6. The Group has assets and revenues in a number of jurisdictions. The United States, Germany, the Netherlands, the United Kingdom, Canada and Ireland together account for over 80% of Group revenue, and over 80% of the Group assets are located in the

United States, Germany, the Netherlands, the United Kingdom and Canada. Of these, the United States and Canada are two of the most significant, and the intention is to apply for recognition of the Schemes in those two jurisdictions. Expert advice has been obtained in respect of both of those jurisdictions and the Netherlands to the effect that the Schemes should be recognised by the courts of those jurisdictions. Recognition by the US Bankruptcy Court (via an order under Chapter 15 of the US Bankruptcy Code in respect of syncreon UK, which it is anticipated will result in effective recognition of the syncreon Group Scheme) and by the Canadian court are conditions to the implementation of the restructuring.

7. Both the PCF and the Notes are now governed by English law and contain provisions submitting to the non-exclusive jurisdiction of the English courts. This was the result of amendments made earlier this month, which were made with the express purpose of strengthening the connection to the English jurisdiction with a view to permitting a restructuring using English schemes of arrangement. The changes were made pursuant to the majority amendment powers contained in the PCF and in the Notes Indenture. The agreements were previously governed by New York law, and the evidence included advice from an expert in New York law concluding that the changes are valid and enforceable.

8. The largest PCF lender and Noteholder by value is Syncreon CayFinance Ltd ("CayCo"). This company is 100% owned by the ultimate parent of the Group and is therefore an affiliate of the Group. It is the sole lender under one of the term loan facilities forming part of the PCF, the incremental term loan facility. Cayco has also granted certain additional security to lenders under the revolving credit facility element of the PCF, in return for their agreement to extend the term of the revolving loans.

9. The Group has other indebtedness that will not be covered by the Schemes and which it is proposed will be refinanced consensually. In particular, syncreon Group entered into a secured liquidity facility in March 2019. This was provided by certain PCF lenders to provide the Group with liquidity to operate its business during the negotiation and implementation of the restructuring. There is currently US$75.5m outstanding under this facility, which benefits from the same guarantees and security as the PCF, as well as certain additional guarantees and security. Under an intercreditor arrangement it ranks senior to the PCF. In addition, another member of the Group (not party to these proceedings) has borrowed under a secured receivables facility agreement referred to as the ABL debt, the current principal amount outstanding being approximately US$80m.

10. A Restructuring Support Agreement ("RSA") was entered into in May 2019 with an ad hoc group of PCF lenders, certain key Noteholders and CayCo, together representing a substantial majority by value of the PCF lenders, Noteholders and all the lenders under the liquidity facility. Among other things the RSA contains provisions for relevant parties to vote in favour of the Schemes, together with provisions restructuring the ABL and liquidity facility by consent. The RSA makes provision for a new super priority facility ("First Out Term Loans") of US $125.5m, of which US$75.5m represents a restructuring of the liquidity facility and US $50m is new money. The RSA also makes provision for lenders under the liquidity facility agreement to receive a total of 2.5% of the equity of Newco for agreeing to amend it and agreeing to forbear enforcement.

11. Under a further agreement entered into in June 2019 the new First Out Term Loans facility is "backstopped" by certain PCF lenders, in the sense that they have agreed to fund the whole of it insofar as it is not taken up by others, in return for consideration amounting to 5% of the equity of Newco (the "Backstop Payment"). CayCo has also agreed to make available ("turnover") potential funding rights to some PCF lenders, being lenders under the revolving credit facility. Other non-participating PCF lenders are being given the opportunity to participate in part of the new lending.

12. The Group took the view, with advice from its financial advisers, that there was no practical alternative to securing the urgent funding required except from members of an ad hoc group of PCF lenders.

13. Since the RSA was signed, additional creditors have acceded to it. PCF lenders and Noteholders that entered into or otherwise acceded to the RSA by 22 July will qualify for "lock-up" payments if the restructuring proceeds. These lock-up payments take the form of 5.5% of Newco equity for PCF lenders and 2.5% for Noteholders. As at 23 July the RSA has been signed by creditors representing 96.5% of the PCF debt and 95.8% of the Notes by value (expected to increase to 97.6% of the Notes following the cancellation of certain Notes purchased by the Parent).

14. A "Practice Statement" letter was issued on 10 July 2019, pursuant to the Practice Statement (Companies: Schemes of Arrangement) dated 15 April 2002, giving notice of the intention to make this application. This was provided to the PCF agent (who maintains a data site in respect of the PCF debt), the Notes trustee and to DTC, for onward dissemination to Noteholders. In addition, a website has been created which can be accessed by all Scheme creditors, and the letter was made available on that website. A similar process has been undertaken in respect of notification of this hearing and in respect of entitlements to lock-up payments, and is proposed in relation to notices of Scheme meetings and Scheme documents.

The Court's role at the convening stage

15. The court's role at this stage of proceedings is to give directions as to the calling of meetings. The principal issue to be addressed is the proper composition of classes, because if the classes are not properly constituted then ultimately the court will not have jurisdiction to sanction the Schemes: *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480. It is not a hearing to consider the merits or fairness of the Schemes.

16. In addition, where appropriate the court will consider other issues, although these will generally be limited to a determination of whether it is obvious that the court has no jurisdiction or should otherwise refuse to exercise its discretion to sanction the scheme ("roadblock" issues): *Re Noble Group Ltd* [2018] EWHC 2911 (Ch) ("*Noble*") at [76].

Classes: the legal test

17. The legal test to apply in determining whether creditors form a single class is whether their rights are "not so dissimilar as to make it impossible for them to consult together with a view to their common interest" (*Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583). The test is based on similarity or dissimilarity of legal rights against the scheme company, not on similarity or dissimilarity of interests not deriving from

legal rights, and the fact that individuals may hold diverging views based on their private interests not derived from their legal rights against the company is not a ground for separate meetings. The focus must be on the rights which are to be released or varied by the Schemes and the new rights given in their place: *Re UDL Holdings Ltd* [2002] 1 HKC 172 at 184, per Lord Millett.

18. In *Re DX Holdings Ltd* [2010] EWHC 1513 (Ch), Floyd J (as he then was) pointed out at [5] that a difference is only sufficient to mandate the creation of a separate class if it is sufficiently great to make consultation with a view to the class members' common interest impossible. That is a value judgment involving, among other things, the materiality of the difference in rights. Differences can be material without leading to separate classes, and a robust approach must be taken: *Re Lehman Bros International (Europe) (in admin)* [2019] BCC 115 ("*Lehman Bros*") at [70].

19. In this case, the existing rights that must be considered, alongside the new rights that would be granted under the Schemes, are the rights of the creditors in the likely insolvency process or enforcement scenario that would be the alternative to the Schemes being implemented, see *Re Telewest Communications plc (No 1)* [2005] 1 BCLC 752 at [29].

Classes: syncreon's submissions

20. The four proposed voting classes are 1) PCF lenders and 2) Noteholders in respect of the syncreon Group Scheme, and 3) PCF lenders and 4) Noteholders in respect of the syncreon UK Scheme. No creditor has raised any objection to this.

21. The Group's view is that the PCF lenders rank *pari passu* as secured creditors and benefit from the same guarantees, such that they would secure similar levels of recovery in the most probable alternative scenarios, and under the Schemes their entitlements will be the same. Although there is a difference in interest rates between certain of the PCF facilities that is said to be immaterial. The fact that CayCo, in its capacity as a PCF lender, has granted certain additional security to lenders under the revolving credit facility, such that they would secure higher recoveries in the event of an insolvency, is not considered to mean that all PCF lenders cannot consult together with a view to their common interests, because this is not a difference in rights as against Scheme companies, but is primarily an inter-creditor arrangement, and will not affect entitlement under the Schemes. As regards the RSA, all PCF lenders were given the opportunity to accede to it and qualify for the lock-up payment (which was offered for valid commercial reasons), and in any event that payment is not regarded as sufficiently material to fracture the class, because it would not likely cause a lender to vote in favour of the Schemes when they would otherwise not do so, bearing in mind that all PCF lenders are likely to be better off under the Schemes than under alternative scenarios.

22. As regards Noteholders, they again rank *pari passu* as between themselves and benefit from the same guarantees, and would therefore secure similar recoveries in the event that the Schemes failed. Their pro rata entitlement to consideration under the Schemes will be the same. As regards the RSA, again all note holders were given the opportunity to accede to it, and in any event (and in the same way as the PCF lenders) the additional right to lock-up payment is not regarded as sufficiently material to fracture the class.

23. The Group says that the additional amounts that liquidity facility lenders and "backstop" lenders will receive will not be conferred on lenders in their capacity as PCF lenders or Noteholders, and were negotiated separately on arm's-length terms in difficult circumstances and in consideration of key commitments necessary to strengthen the Group's liquidity position and reduce the burden of its debt service obligations. They are collateral to the Schemes. Furthermore, the class position is not affected by the fact that some lenders hold both PCF loans and Notes.

Classes: discussion

24. I agree that, subject to the points made below, the PCF lenders each enjoy the same rights against syncreon UK and syncreon Group (taking account of the likely alternative scenarios to the restructuring) and will receive the same rights under the Schemes. The same applies to the Noteholders.

25. I do not consider that differences in the interest rates chargeable in respect of different parts of the PCF debt creates a sufficiently material difference between PCF lenders, bearing in mind the equivalent rights in other respects and their equivalent entitlements under the Schemes. I also do not consider that the fact that some PCF lenders hold the benefit of security and turnover rights granted by CayCo (and indeed that those lenders will, if the restructuring proceeds, benefit from a transfer to them by CayCo of cash collateral that it has provided) makes a difference. CayCo is not a Scheme company, and the test for class composition focuses on the similarity or dissimilarity of legal rights as against the company the subject of the relevant Scheme.

26. I am satisfied that the lock-up payments do not fracture the classes in this case merely because some members of the class will not receive those amounts. Apart from the fact that the lock-up payments are not provided under the Schemes (and so might be regarded as collateral on that basis), the most significant factor is that the lock-up payments have been offered to all Scheme creditors. I prefer to rely principally on this point rather than the question of whether the value of the lock-up payments is material, such as to have had any likely material influence on voting decisions. The evidence suggests that the payments are immaterial for PCF lenders, but the position is less clear in relation to Noteholders when the lock-up payment is compared to the value of the consideration under the Schemes. However, I also accept that the primary factor in any decision to vote is likely to be a comparison between what is available under the Schemes and the position under any alternative scenario, where it is expected that Noteholders will receive nothing or very little. I also note that in this case the lock-up payments take the form of equity rather than cash, such that their value is in any event uncertain and carries risk. Finally, any question as to whether the lock-up payments had a material impact on voting can be raised at the sanction stage, either as a question of class constitution or more likely in relation to the exercise of the court's discretion to sanction the Schemes.

27. The Backstop Payment is made in exchange for taking on the risk of having to lend new money, and again is provided for outside the terms of the Schemes. It also takes the form of equity rather than cash. I accept the evidence that the Group did not have other practical sources of funding and needed to demonstrate to key customers a firm commitment to advance new funds. The Backstop Payment is the price for that. It is also explained in the Practice Statement Letter and Explanatory Statement. Any fairness related issues should be explored at the sanction hearing.

28. I am also satisfied that cross holdings between classes of lenders (where a member of one class is also, in respect of another legal right, a member of another class – here, where a creditor is both a PCF lender and a Noteholder) do not fracture class composition. A creditor remains a creditor as a member of one class even if it holds a collateral interest as a member of a different class: *Lehman Bros* at [78]. Lenders do not have any additional rights by virtue of having cross-holdings.

29. Finally, the 2.5% of Newco equity to which liquidity facility lenders will become entitled if the restructuring proceeds is separate from the Schemes and relates to amending, and forbearing in respect of, that facility. In addition, if the restructuring does not proceed these amounts will be paid in any event, in cash. This emphasises the fact that they are collateral in nature.

Jurisdiction

30. Syncreon UK is both incorporated and has its centre of main interests in England and Wales. It is clearly appropriate for the court to exercise jurisdiction in respect of that company. Syncreon Group is Dutch incorporated and does not have an English centre of main interests. The court will not exercise jurisdiction in respect of syncreon Group without being satisfied that it has a "sufficient connection" with the jurisdiction (see for example *Lehman Bros* at [62]). Syncreon Group relies on the documents now being governed by English law and the parties having contractually submitted to the jurisdiction of the English courts.

31. The fact that the PCF and Note documentation is now governed by English law, and that the parties have submitted to the jurisdiction of the English courts, does provide a sufficient connection with the English jurisdiction: *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch) at [8] and [9]. The change to the governing law is expressly contemplated by Article 3(2) of the Rome I Regulation (593/2008), and there is no objection in principle to such a change under English law: *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm) at [30].

32. There have been a number of cases where governing law clauses have been changed with a view to creating a sufficient connection with the English jurisdiction for the purposes of a scheme of arrangement. Whether that fact makes any difference to the court's decision is a matter for the judge considering whether to sanction the Schemes, and not a matter for determination at this stage. For present purposes I will limit my comments to noting two points. First, the motivation behind the change to the governing law and jurisdiction clauses was explained to PCF lenders and Noteholders when the changes were sought. Secondly, the Group has received advice that the changes to the governing law and jurisdiction provisions will be respected (see [7] above), and that the Schemes should be recognised in the US, Canada and the Netherlands. Indeed, in the case of the US and Canada recognition is a condition of the restructuring. Although there are also significant operations in Ireland and Germany, it is anticipated that those jurisdictions will follow the EU principles referred to in the Dutch advice, and accordingly will be recognised there as well. In *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) David Richards J (as he then was) considered that the question of sufficient connection was closely related to the question of whether the scheme would have a substantial effect (paragraph 21).

33. In these circumstances I am satisfied that there are no "roadblock" issues which make it obvious that the court has no jurisdiction or should otherwise refuse to exercise its discretion to sanction the Schemes, and accordingly that it is appropriate to permit the proposed Scheme meetings to be convened.

Foreign representative

34. A final point to mention is that I was asked to include in the order a declaration that an officer of the Scheme companies was their appointed "foreign representative" for the purposes of any proceedings commenced in the United States under Chapter 15 or in Canada under the Canadian Companies' Creditors Arrangement Act, R.S.C 1985. The order I made was in terms of a declaration that the individual in question had been validly appointed by the directors of each of the Scheme companies to represent them and act as their agent in seeking relief available to a foreign representative. As Snowden J noted in *Noble* at [170], the question whether an individual actually qualifies as a foreign representative is a matter for the foreign court.