Case No: CR-2019-008403

**NEUTRAL CITATION NUMBER:[2019]EWHC 3615 (Ch)**
**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**

**IN THE MATTER OF LECTA PAPER UK LIMITED**
**AND IN THE MATTER OF THE COMPANIES ACT 2006**

7 Rolls Buildings,
Fetter Lane, London,
EC4A 1NL

Date: 19 December 2019

**Before** :

**MR JUSTICE ZACAROLI**

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**Daniel Bayfield QC, Ryan Perkins and Stefanie Wilkins** (instructed by **Linklaters LLP**) for the Claimant Company

Hearing date: **19 December 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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# MR JUSTICE ZACAROLI

**Mr Justice Zacaroli:**

Introduction

1. On 19 December 2019 I heard an application to convene a meeting of creditors of Lecta Paper UK Limited (the "Company") to consider a scheme of arrangement pursuant to Part 26 of the Companies Act 2006. On that date, I made an order convening a meeting of a single class of scheme creditors, and gave other directions relating to the convening of that meeting. This judgment contains my reasons for doing so. I am indebted to Counsel for their thorough skeleton argument and to Mr Bayfield QC for his clear and succinct submissions.

2. Since this application does not raise any new point of law or practice, I will state my reasons relatively briefly.

3. The Company is part of the Lecta group of companies, a leading producer of paper products. The group has over €700 million of financial indebtedness and has fallen into serious financial difficulty.

4. The financial indebtedness includes two series of senior secured notes ("SSN") with an aggregate face value of €600 million. The first series comprises €225 million floating rate senior secured notes due 2022. The second series comprises €375 million 6.5% fixed rate senior secured notes due 2023.

5. The proposed scheme is between the Company and the holders of the beneficial interests in the SSNs.

6. The Company, which is incorporated in England and Wales and has long been a part of the group, is a co-issuer of the SSNs, having recently assumed joint and several liability with the original issuer of the SSNs, Lecta S.A., a company incorporated in Luxembourg. The SSNs were originally governed by New York law and subject to the jurisdiction of the New York courts. Pursuant to resolutions of the relevant noteholders, however, the governing law of each of the SSNs has been changed to English law and each is now subject to the jurisdiction of the English courts.

7. There is, in addition, a fully drawn credit facility with an aggregate principal amount of €65 million (the "RCF") and working capital facilities (borrowed by various operating companies within the group) of approximately €38 million. The indebtedness under the RCF is not included within the scheme, but is included within a wider restructuring.

8. The proposed scheme, in essence, will release the SSNs in consideration for a combination of new senior notes with a face value of €200 million, new junior notes with a face value of €95 million and 95% of the share capital in a new holding company of the group. The wider restructuring includes the creation of a new holding structure for the group and the provision of new money under new super senior facilities.

9. The principal issue for consideration on an application to convene a meeting of creditors is the constitution of the class meeting or meetings.

Notice of the convening hearing

10. A preliminary issue, however, is whether sufficient notice was given to scheme creditors in advance of the hearing of the application to convene a meeting of creditors. The practice statement letter was sent to scheme creditors on 5 December 2019. The essential question, as posed by Norris J in *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch), at [22] to [23], is whether in all the circumstances of the case (including the complexity of the scheme, the degree of prior consultation with creditors and the urgency of the scheme) creditors have been given sufficient notice of the basic terms of the scheme and an effective opportunity to raise any concerns.

11. In this case, I am satisfied that adequate notice has been given, taking into account in particular the following matters:

    i) As long ago as 24 September 2019 an announcement was made via the Luxembourg Stock Exchange and via the group website that agreement had been reached in principle involving the exchange of debt for equity;

    ii) On 1 November 2019 an announcement was made via the same portals of a lock-up agreement having been reached. This announcement summarised the key terms of the restructuring;

    iii) A very high percentage of scheme creditors have acceded to the lock-up;

    iv) The practice statement letter and other documents relating to the scheme were uploaded to the website on 5 December 2019, and notifications were made through clearing systems;

    v) There is considerable urgency, given an impending cashflow crisis in February 2020;

    vi) So far as class composition is concerned – for reasons I will explain – the issues are relatively straightforward, such that scheme creditors would not need any great time to consider the position.

Class composition

12. The legal test for the composition of classes is well known: are the rights (as opposed to interests) of scheme creditors so dissimilar as to make it impossible for them to consult together with a view to their common interest? The reference to rights includes both the existing rights of creditors, and the rights conferred by the proposed scheme.

13. In considering the application of this test, the first question is the appropriate comparator. The Company says that it is an insolvent liquidation. While there is an absence of detailed evidence (in terms of accounts or evidence from accountants detailing the Company's financial position), I am satisfied on the basis of the statements made in the witness statement of Mr Minguzzi, on behalf of the Company, that there is a sufficiently high likelihood that, absent the proposed scheme, the Company would enter a formal insolvency process. As Mr Bayfield QC submitted, the fact that there is overwhelming support for the restructuring from scheme creditors

(who will see a reduction in their debt by 50%) and from shareholders (who will see their shareholding effectively wiped out) is strong support for the conclusion that in the absence of the proposed scheme the Company is likely to be insolvent. In *Re Co-operative Bank PLC* [2013] EWHC 4072 (Ch), at [11] to [13], Hildyard J concluded that it is not necessary to be certain that an insolvent liquidation would be the outcome, absent the scheme. It is enough that the consideration by scheme creditors would be informed by the very real risk of insolvency. I am satisfied that is the case here.

14. In that context, while the existing rights of the two groups of noteholders are different (as to interest rate and maturity), those differences are immaterial for the purposes of the test to be applied. Interest accruing beyond the commencement of a liquidation would not be recovered by creditors, unless there was a surplus (which is highly unlikely if the comparator is an insolvency liquidation) and all SSNs would be accelerated to become due immediately upon a liquidation. Apart from these differences, all of the notes rank pari passu and share in the same security package.

15. The same rights are conferred by the proposed scheme on all the scheme creditors.

16. Mr Bayfield has drawn my attention to three other matters which are potentially relevant to the constitution of classes. I am satisfied that none of them leads to the fracturing of the single class.

17. The first is a consent fee payable to those scheme creditors who committed to the lock-up agreement. The fee was offered to all scheme creditors. It was in exchange for an early lock-up, from which the company gained a real commercial advantage. The size of the fee – as a proportion of the scheme consideration – is in region of 2.9% to 3.6%. I have no doubt that it is not such as might have an influence on voting intentions.

18. The second is that certain fees of the coordinating committee (the members of which have been heavily engaged in negotiating and drafting the documentation for the restructuring) are to be paid by the Company. Since, however, this is limited to reimbursing the members of the committee for the disbursements actually incurred by them, and since they are payable in any event (and not dependent upon sanction of the scheme), this does not fracture the class.

19. The third point is that certain noteholders will be excluded from holding the new instruments conferred by the proposed scheme. This requirement stems from certain regulatory concerns in Europe (so far as retail holders are concerned) and in the US (where regulations might require a prospectus to have been issued). Any concern so far as constitution of classes is concerned is removed, in my judgment, by the fact that any such person can nominate a third party, such as their broker or custodian, to hold the instruments for them. While this does constitute a difference in the rights conferred by the proposed scheme, in view of the right to nominate a third party to hold the instruments, I do not consider that the difference is such as to render the affected scheme creditors incapable of consulting with other scheme creditors with a view to their common interest.

20. Accordingly, I am satisfied that it is appropriate to convene a meeting of a single class of scheme creditors.

International jurisdiction

21. Although not strictly a matter to be determined at the convening hearing, the question whether the Court has jurisdiction (in the international sense) to sanction a scheme of arrangement in respect of the relevant company is regularly considered at this stage since, if there is no jurisdiction to sanction the scheme, there would be no point in allowing the proposed scheme to proceed a step further.

22. The Company is incorporated in England and Wales. It therefore clearly satisfies the only jurisdictional requirement for a company under Part 26 of the Companies Act 2006, namely that it is liable to wound up under the Insolvency Act 1986: see, for example, *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), per David Richards J, at [11].

23. It is relevant to consider whether the fact that the Company became a party to the indentures in relation to the SSNs only as of 4 December 2019, and specifically for the purpose of enabling a scheme of arrangement to be proposed in relation to the holders of the SSNs, detracts from the conclusion that the court has jurisdiction to sanction a scheme between this Company and the scheme creditors. The counter-argument might be that the Court should refuse to accept jurisdiction where jurisdiction has been "acquired" through such a device.

24. I would reject such counter-argument. While the fact that jurisdiction has been "acquired" in this way for the purpose of attracting jurisdiction under Part 26 might be an issue to be considered at the sanction hearing, on the basis that it is a relevant consideration in determining the overall fairness of the scheme, it is not something which negates the jurisdiction of the Court: see, for example, *Re Codere Finance (UK) Limited* [2015] EWHC 3206 (Ch) (Nugee J), and [2015] EWHC 3778 (Ch), where Newey J concluded, on the facts of that case, that it involved 'good forum shopping' and, as such, it was appropriate to sanction the scheme.

25. There is an unresolved question as to whether a scheme of arrangement under Part 26 is subject to the Recast Judgments Regulation. If it applied it would, subject to exceptions, require creditors domiciled in a Member State to be sued in that Member State. It has been the usual practice of the Court to assume that the Regulation applies where it can readily be demonstrated that one or other of the exceptions applies. In this case, I am satisfied that the exception provided by Article 8 of the Regulation applies, because four of the creditors are domiciled here (those creditors holding 4.3% of the debt). In this connection, I propose to follow the conclusions reached by Newey J (at the convening hearing, [2016] EWHC 3562 (Ch)) and Norris J (at the sanction hearing, [2016] EWHC 3563 (Ch)) in *Re DTEK Finance plc*, namely that in order to establish jurisdiction under Article 8 it is unnecessary to have regard to the number and size of scheme creditors in this jurisdiction.

26. In addition, I am satisfied, in light of the jurisdiction clauses inserted into the amended indentures in respect of both series of SSNs, that the exception provided by Article 25 of the Regulation is engaged.

27. Finally, I note that the Company has produced evidence from a number of experts testifying to the effectiveness of the scheme in the various jurisdictions where the group's assets are situated. This is a matter to be considered at the sanction hearing,

unless it is clear at the convening hearing that there is an insuperable difficulty. There is no such difficulty here.

Directions for convening the scheme meeting

28. I was taken through the draft Order by Mr Bayfield and need say no more than that I am satisfied that the proposed directions for convening the scheme meeting are appropriate.

29. The only other matter worthy of specific mention is that, as has been held on numerous prior occasions, it is appropriate to treat the beneficial holders of the SSNs as creditors entitled to vote, on the basis that they are contingent creditors by reason of a provision in the indentures entitling the beneficial owners of the SSNs in certain circumstances to call for the issue to them of definitive notes (to replace the existing global note).