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Case No: CR-2020-003850

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 14 October 2020

Before :

MR JUSTICE ADAM JOHNSON

IN THE MATTER OF SELECTA FINANCE UK LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Daniel Bayfield QC and Ryan Perkins (instructed by **Kirkland & Ellis International LLP**) for the **Company**

Hearing dates: 2 October 2020

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 ADAM JOHNSON

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be (14 October 2020 at 10.00 AM.)

Mr Justice Adam Johnson:

1. On 2 October 2020 I heard an application by Selecta Finance UK Limited ("*the Company*"), by which it sought an Order convening a single meeting of certain of its creditors ("*the Scheme Creditors*"), for the purpose of considering a scheme of arrangement ("*the Scheme*") under Part 26 of the Companies Act 2006 ("*CA 2006*"). At the conclusion of the hearing I indicated that I would make the Order sought, but would give reasons separately. This Judgment sets out those reasons.

Background

2. The main evidence relied on by the Company was a Witness Statement of a director, Mr Schneiter. The Company is incorporated in England. It was incorporated only on 13 August 2020, and so is a recent addition to the Selecta group ("*the Group*"). I am told that the Group is the leading provider of unattended self-service coffee and convenience food in Europe. It is ultimately owned beneficially by various investment funds managed by KKR, which is described as an alternative asset management firm.

3. The Scheme concerns three series of senior secured Notes ("*the Existing SSNs*"), which have an aggregate principal amount of €1.24 billion plus CHF 250 million.

4. The Existing SSNs were issued originally not by the Company but by Selecta Group BV ("*the Parent*"), a company incorporated in the Netherlands. They were issued pursuant to a Trust Deed dated 2 February 2018 (the "*Trust Deed*"), and were originally governed by New York law and subject to a provision for the New York Courts to have exclusive jurisdiction.

5. The Existing SSNs are more particularly described as follows:

   i) a series of senior secured notes (due in 2024) with an aggregate principal amount of €865 million and a fixed interest rate of 5.875% per annum;

ii) a series of senior secured notes (due in 2024) with an aggregate principal amount of €375 million and a floating interest rate of EURIBOR + 5.375% per annum; and

iii) a series of senior secured notes (due in 2024) with an aggregate principal amount of CHF 250 million and a fixed interest rate of 5.875% per annum.

6. The Existing SSNs form part of a wider set of financing arrangements for the Group. The Parent and other Group entities are borrowers under a €150 million revolving credit facility with a group of bank lenders (the "*RCF*"), which is fully utilised, and they are also borrowers under a €50 million term loan facility (the "*Liquidity Facility*") advanced by various lenders affiliated to KKR in March 2020.

7. The Existing SSNs, the RCF and the Liquidity Facility share the same guarantee and security package. Guarantees and security have been provided by numerous Group companies.

8. The ranking as between the Existing SSNs, the RCF and the Liquidity Facility is the subject of an intercreditor agreement dated 31 January 2018 ("*the Intercreditor Agreement*"). Under the terms of that Agreement, the financial liabilities of the Group rank in the following order of priority (in the event that the security is enforced):

i) first, the RCF and the Liquidity Facility (on a *pari passu* basis in the event of any shortfall); and

ii) second, the Existing SSNs.

9. The Existing SSN's are therefore contractually subordinated to the RCF Facility and the Liquidity Facility.

10. Each of the Existing SSNs is issued in the form of a global note, legally held by a nominee entity, and with beneficial interests in the global notes being traded through Euroclear and Clearstream (the "*Clearing Systems*"). An institution

(Lucid Trustee Services Limited) acts as the trustee of the Existing SSNs (the "*SSN Trustee*") to represent the interests of the SSN Holders.

11. For the purposes of the present application, the Company's submission, which I accept, is that the relevant parties in interest who qualify therefore as the *Scheme Creditors* (see above) are the ultimate beneficial owners of the Existing SSNs (referred to before me as "*SSN Holders*" or "*Existing SSN Holders*"). That follows because the SSN Holders are entitled to call for the issuance of "*definitive notes*" in certain circumstances (see section 2.06 of the Trust Deed), and since a definitive note would represent a direct payment obligation owing by the issuer to the ultimate beneficial owner of the relevant notes, the SSN Holders are to be treated as contingent creditors for the sums due under the Existing SSNs. That logic has been applied in a number of previous cases, see e.g. Re Castle Holdco 4 Ltd [2009] EWHC 3919 (Ch) at [23] per Norris J; Re Co-operative Bank plc [2013] EWHC 4072 (Ch) at [23] per Hildyard J; and Re Noble Group Ltd [2019] BCC 349 (convening judgment) at [161]-[164] per Snowden J.

12. The evidence is that the Group has experienced a significant decline in financial performance as a result of the COVID-19 pandemic; that there is therefore a need to reduce the Group's financial indebtedness; and that the Scheme is part of a wider restructuring designed to achieve that objective. Shorter term liquidity pressures were addressed by certain measures taken by the Group (including the entry into of the Liquidity Facility mentioned above), but the evidence is that by about May 2020, the view had been taken that a more extensive restructuring was required.

13. Consequently, at about that time, negotiations were opened up with a number of the Group's key financial stakeholders. These included discussions with an ad hoc group of SSN Holders (the "*AHG*"), comprising approximately 45.44% of the Existing SSNs. Thereafter, a number of things followed.

14. The Company was incorporated on 13 August 2020. As I understand it, this was with a view to taking advantage, so far as the Existing SSNs are concerned, of the scheme jurisdiction in Part 26 CA 2006.

15. On 8 September, the Parent announced that it had reached an agreement in principle with its key financial stakeholders to a proposed restructuring of its balance sheet (the "*Restructuring*"). A press release was issued and publicised via (amongst other means) a website managed by Lucid Issuer Services Limited, which has been engaged to co-ordinate communications with the SSN Holders (the "*Information Agent*"). The Restructuring includes steps both in relation to the RCF and the Liquidity Facility (for example, if the Restructuring is effective the maturity date of the RCF will be extended to 1 January 2026), but also, critically for present purposes, steps in relation to the Existing SSNs. It is such steps which are the subject of the Scheme. I will describe the proposals in more detail below.

16. Also on 8 September 2020, the Parent and the AHG (among others) entered into a lock-up agreement (the "*Lock-Up Agreement*") reflecting the proposed Restructuring, including the Scheme. Among other provisions, the Lock-Up Agreement obliges the parties thereto to take all actions which are reasonably requested and necessary in order to support, facilitate, implement and consummate the Restructuring. Additionally, a consent fee equal to 0.25% of the Existing SSNs held by each signatory to the Lock-Up Agreement is payable in cash upon the completion of the Restructuring (the "*Lock-Up Fee*").

17. On 9 September 2020, a consent request was issued to the Existing SSN Holders, seeking their agreement to amend the terms of the Existing SSNs. The proposed amendments - to be given effect under the then governing law of the Existing SSNs, namely New York law - were again made with a view to engaging the scheme jurisdiction of this Court under CA 2006, Part 26. The evidence is that by 14 September 2020, the Existing SSN Holders holding a majority by value of the Existing SSNs had provided their consent to (among others) the following key changes to the terms of the SSNs:

    i) Amendment of the governing law provisions of the Trust Deed so that the Existing SSNs are governed by English rather than New York law.

    ii) Amendment of the jurisdiction provisions of the Trust Deed so that the Existing SSNs are subject to the exclusive jurisdiction of the English

Court in relation to any proceedings commenced by an obligor of the Existing SSNs, and the non-exclusive jurisdiction of the English Court in relation to other proceedings (I will set out the terms of the relevant amendment below).

iii) Accession of the Company to the Trust Deed as a co-issuer of the Existing SSNs.

18. I should say that I have been referred to an expert report of Professor Anthony J. Casey, an expert on United States and New York law, whose evidence confirms that the amendments to the governing law and jurisdiction clauses of the Trust Deed are valid under New York law and would be regarded as effective in any United States court applying that law.

19. The Company entered into a Supplemental Trust Deed on 14 September 2020 and thereby became a co-issuer of the Existing SSNs under the Trust Deed.

20. Additionally, the Company acceded as a guarantor of the Group's RCF on 14 September 2020. As a consequence of becoming a co-issuer of the Existing SSNs and a guarantor of the RCF, the Company also acceded to the Existing Intercreditor Agreement as a debtor on 14 September 2020.

21. The upshot of these various steps is that as from 14 September, the Existing SSNs have been governed by English law and subject to a provision conferring jurisdiction on the English Court; the Company, an English incorporated entity, has been a co-issuer of the Existing SSNs together with the Parent; but the ranking of the Existing SSNs vis-à-vis the RCF and the Liquidity Facility remains as described at paragraphs [8] and [9] above.

22. On 15 September, following completion of the steps identified above, the Company formally notified the Scheme Creditors of the present convening hearing by way of a Practice Statement Letter ("*PSL*"), published pursuant to the Chancellor's Practice Statement issued on 26 June 2020. The PSL was circulated through the Clearing Systems, and in addition was provided to the SSN Trustee and uploaded onto a dedicated "*Scheme Website*" maintained by the Information Agent.

23. I have mentioned above the Lock-Up Fee. This is payable on completion of the Restructuring to all SSN Holders who chose to accede to the Lock-Up Agreement by 21 September 2020. I understand that approximately 81.1% by value of the SSN Holders had signed the Lock-Up Agreement by that date and so in principle are entitled to the Lock-Up Fee.

24. In terms of immediate issues, on 1 October 2020 (i.e., the day before the convening hearing) a coupon payment fell due on the Existing SSNs. That payment was not made. The circumstances are explained in the evidence of Mr Schneiter: the Group's calculations are that payment of the October coupon would have resulted in the Group's available cash resources falling below €25 million in November 2020, and below zero in December 2020, and the Group considers it needs to have available cash of €25 million in order to continue as a going concern.

25. That gives rise to the following situation. If the proposed Scheme is not approved in the meantime, the consequence of non-payment of the October coupon will be to trigger an Event of Default under the Trust Deed on 31 October 2020, which in turn will entitle the SSN Holders to accelerate the Existing SSNs and take enforcement action against the Group. Mr Schneiter's evidence is that such steps, if taken, would result in key entities in the Group having no choice but to enter into formal insolvency proceedings. Because such an outcome would be disastrous, it is said to be likely that as an alternative, a majority in value of the SSN Holders would be willing to enter into some form of forbearance arrangement; but that in turn would very likely involve the Group being required to sell its assets and business on an accelerated basis.

26. As matters stand, therefore, it is said that the choice for the SSN Holders is in reality between (1) the returns that would flow to them, on the basis of their contractual and security interests, on such an accelerated sale, and (2) the alternative arrangements offered via the Scheme.

27. The Group has instructed BDO as independent financial adviser to analyse the predicted outcome of an accelerated sales process. They have done so on the basis of a number of different valuation methodologies. Their favoured

approach (a discounted cashflow analysis) estimates that on the basis of an accelerated sale, and given the security arrangements described above including the subordination provisions of the Intercreditor Agreement, the SSN Holders would receive a total return of 50.2% of the sums presently due to them (this represents a mid-point between a low case of 44.9% and a high case of 56.3%).

28. As to the possible alternative, the essential structure of the Scheme is that, in exchange for each Scheme Creditor releasing 100% of its Existing SSNs, each such Creditor will receive:

i) new senior secured, first lien notes issued by the Parent with a maturity date of 1 April 2026 (the *"New 1L Notes"*), bearing (i) cash interest of 3.5% per annum plus capitalised interest of 4.5% per annum from the issue date until 2 January 2023, and (ii) cash interest of 8% per annum thereafter;

ii) new senior secured, second lien notes issued by the Parent with a maturity date of 1 July 2026 (the *"New 2L Notes"*), bearing (i) capitalised interest of 10% per annum from the issue date until 2 January 2023, and (ii) at the Parent's election, capitalised interest of 10% per annum or cash interest of 9.25% per annum thereafter;

iii) preference shares (the *"Class A Preference Shares"*) issued by Selecta Group FinCo S.A., a newly incorporated limited liability company incorporated in Luxembourg, which will be inserted as a new intermediate holding company of the Group. These shares will bear a dividend rate of 12% per annum with a redemption date of 1 October 2026.

29. As to the number of New 1L Notes, New 2L Notes and Class A Preference Shares to be made available, the proposals are that:

i) Each Scheme Creditor shall be entitled to receive an aggregate principal amount of New 1L Notes equal to approximately 44.2% of the aggregate principal amount of the Existing SSNs held by that Scheme Creditor (plus accrued but unpaid interest).

ii) Each Scheme Creditor shall be entitled to receive an aggregate principal amount of New 2L Notes equal to approximately 16.3% of the aggregate principal amount of Existing SSNs held by that Scheme Creditor.

iii) Each Scheme Creditor shall be entitled to receive an aggregate principal amount of Class A Preference Shares equal to 16.3% of the aggregate principal amount of Existing SSNs held by that Scheme Creditor.

30. To put it more crisply, the Scheme involves a partial debt-for-debt swap and a partial debt-for-equity swap, designed to enable the Group to reduce its debt to what is described as a sustainable size, and in the view of the Group offer a better potential outcome to the SSN Holders than the possible accelerated sale. As Mr Schneiter expresses it in his Witness Statement, the Scheme Creditors, if the Scheme is approved, will receive approximately 60.5% of the principal aggregate amount of the Existing SSNs (see 29(i) and (ii) above), plus any accrued but unpaid interest (I was told that such interest presently brings the overall total to something in the region of 63%). Moreover, says Mr Schneiter, that takes no account of other benefits, specifically the interest arrangements under the New Notes and any recoveries Scheme Creditors might receive under the Class A Preference Shares.

31. As to eligibility for participation in the Scheme and the mechanics of doing so, the proposal is for a Scheme meeting to take place on 21 October, to be held virtually by webinar. In advance, Scheme Creditors will be sent a detailed Explanatory Statement. They will be asked to submit a standard letter (the "*Account Holder Letter*") by noon UK time on 19 October. Pursuant to the Account Holder Letter, the Scheme Creditors must make certain customary confirmations with respect to US Securities law and EU Regulation, in order to certify their ability to receive their allocation of New Notes and Class A Preference Shares. If a Scheme Creditor fails to deliver a duly completed Account Holder Letter, however, all is not lost: the Scheme Creditor's entitlement will then be issued to a trustee on trust for the relevant Scheme Creditor for a period of 18 months, during which time the unadmitted Scheme Creditor can claim its share of New Notes and Class A Preference Shares.

32. I should mention two other features of the Scheme, before turning to the principal issues raised by the Company's application. First, a key document, namely the Restructuring Implementation Deed, contains provisions which will authorise the Company as attorney or agent to execute contractual documents on behalf of the Scheme Creditors in order to implement the Scheme. This is designed to ensure that, if approved, the Scheme can be carried into effect. I am satisfied as to the appropriateness of that technique, which has been deployed in other scheme arrangements: see e.g., Re ColourOz Investment 2 LLC [2020] EWHC 1864, per Snowden J. at [74]-[75].

33. Second, and relevant also to the question of the overall effectiveness of the Scheme, is the fact that it is intended to operate to discharge the claims of the Scheme Creditors against all of the obligors within the Group – including not only the Company as proposer of the Scheme, but also the Parent, as co-obligor under the Existing SSNs. Again, it is settled that this is not only an achievable but also a necessary outcome, since otherwise, if a scheme were effective only in discharging the debt owed by one of two co-obligors, the purpose of the scheme might be defeated. As Trower J explained in Re Lecta Paper UK Ltd [2020] EWHC 382 (Ch) at [21], having discussed the similar rule which applies in the case of guarantors:

> "*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].*"

The Present Application

34. Section 896(1) of the CA 2006 provides:

> "*The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.*"

35. That statutory language frames the essential issue for me, which is whether to order a meeting of creditors or of a class of creditors, and if so in what manner and on what terms. This issue has given rise in this case to the following questions, which follow a pattern familiar from other cases in this area:

i) Has sufficient notice been given of the present hearing to Scheme Creditors?

ii) Does the Court have jurisdiction to sanction the Scheme – or, to put the point as Snowden J. expressed it in Re Noble Group Ltd [2019] BCC 349 at [76], the Court should "*indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are other factors which would unquestionably lead the court to refuse to exercise its discretion to sanction the scheme*."

iii) Are the Scheme Creditors in fact a single class of creditors, such that only one Scheme meeting need be convened, or on proper analysis is there more than one class of creditors?

iv) What directions should be given for the Scheme meeting, if one is to be convened, and are any other ancillary Orders or forms of relief appropriate?

36. I will take those points in turn.

Notice of Convening Hearing

37. I was referred to a number of authorities on the topic. Certain of these seem to indicate a period of 14 days' notice as standard, or as usual practice; but in others

shorter periods have been permitted (for example in cases of urgency), and in others 14 days has been considered inadequate, having regard to factors such as the complexity of the scheme in question and the degree or urgency involved.

38. I do not think I need to cite in detail from any of these authorities, since the common theme is that the proper period of notice is a fact sensitive matter to be determined in the circumstances of each case.

39. In the present case, I accept Mr Bayfield's submission that adequate notice was given.

40. As Mr Bayfield points out, formal notification of the convening hearing was made by way of the Practice Statement Letter dated 15 September 2020 (see [22] above), some 17 days before the hearing; but before that the Scheme Creditors were made aware of the key features of the Scheme and the restructuring by means of the press release of 8 September (see [15] above), some 24 days before the hearing. The latter point is relevant since, as will be seen below, a key issue on the present application - and indeed perhaps *the* key issue - is the relevance of the Lock-Up Fee to the question of whether there is in truth only one class of creditors, and details of the Lock-Up Fee were included in the 8 September press release. I was informed at the hearing that, following circulation of the Practice Statement Letter on 15 September 2020, no objections had been received and more pertinently no Scheme Creditor had written to say they required more time before the hearing to consider their position.

41. I also accept that the Scheme has a degree of urgency. That is not so in the sense that there is any form of immediate financial distress, but on the evidence I am satisfied that the Group has obvious liquidity difficulties. That is reflected in the fact that the Group did not feel able to make the October coupon payment, with the consequence that an Event of Default will almost certainly arise under the Trust Deed on 31 October. I accept the proposition that it is desirable to seek to bring matters to a head vis-à-vis the Scheme before that end-date, and that working backwards, that injects some degree of urgency in relation to prior

steps needed to achieve that objective, including the scheduling of the convening hearing before me.

Jurisdiction

42. Conventionally, two issues arise under this heading.

43. To begin with, there is the question of jurisdiction over the promoter of the scheme under Part 26 of the CA 2006. Part 26 applies to a "*company*". In context that means a company liable to be wound up under the Insolvency Act 1986: see CA 2006 s. 859(2)(b). The Company is such a company, since it is incorporated in England.

44. Of course, the Company was incorporated only on 13 August 2020, and prior to that the financing arrangements of the Group had no or no materially relevant connection with England or English law: the Parent is incorporated in the Netherlands and the Existing SSNs were originally governed by New York law and were subject to the jurisdiction of the New York Courts. It is only by means of the Supplemental Trust Deed that the Company became co-issuer of the Existing SSNs, and that the governing law and jurisdiction provisions were changed so as to refer to English law and jurisdiction.

45. In my judgment, however, such matters do not call into question the conclusion that there is jurisdiction under Part 26 CA 2006 in the sense described above. There are a number of examples in the authorities of cases where steps have been taken to establish a jurisdictional link with England & Wales specifically for the purpose of a company taking advantage of the scheme provisions in Part 26. In Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch), Newey J. (as he then was) said that this practice was not inherently objectionable and referred to it as "*good forum shopping*." As Newey J. recognised, it is possible that in some cases, if the motivation behind the debtor's actions is an illegitimate one (e.g., a desire to evade its debts), then a different analysis may follow. But on the evidence I have seen I am satisfied that the present is not such a case.

46. That deals with the question of jurisdiction under CA Part 26. There is also an issue whether the Court must be satisfied that it has jurisdiction over the Scheme

Creditors under the Recast Judgments Regulation (the "*Regulation*"). It has never in fact been determined whether Chapter II of the Regulation applies to schemes of arrangement. Instead the approach adopted in a number of cases has been to assume that it does apply, and on the basis of that assumption to address the question whether jurisdiction over the Scheme Creditors is established.

47. Adopting that approach in the case, the Company relies on Art. 25(1) and/or on Art. 8 of the Regulation as conferring jurisdiction.

48. Art. 25 confers jurisdiction on the Courts of a Member State if those courts have been nominated in a jurisdiction clause, whether the parties to the clause are themselves domiciled in a Member State or not. By means of the amendments to the Trust Deed effected via that Supplemental Trust Deed, there is such a clause in this case: see the Trust Deed at Section 14.05(a). This is a complex provision, as follows (emphasis added):

> "*The courts of England and Wales shall have non-exclusive jurisdiction to settle any disputes arising out of, related to, or in connection with this Trust Deed, the Notes and the Guarantees or the transactions contemplated hereby, whether contractual or non-contractual, and accordingly any suit, action or proceeding arising out of, related to, or in connection with this Trust Deed, the Notes and the Guarantees or the transactions contemplated hereby ('Proceedings') may be brought in such courts. The courts of England and Wales shall have exclusive jurisdiction to settle any Proceedings instituted by the Original Issuer, the Acceding Co-Issuer or any of the Guarantors in relation to any Holder or the Trustee on behalf of the Holders ('Issuer Proceedings'). The Original Issuer, the Acceding Co-Issuer, each of the Guarantors, the Trustee and each Holder (each, a 'Party') irrevocably submit to the jurisdiction of such courts and agree that the courts of England and Wales are the most appropriate and the most convenient courts to settle Issuer Proceedings and accordingly no Party shall argue to the contrary. Notwithstanding the foregoing, this Section 14.05 shall not limit the rights of the Trustee and each of the Holders to institute any Proceedings against the Original Issuer, the Acceding Co-Issuer or any of the Guarantors in any other court of competent jurisdiction, nor shall the taking of*

> *Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not).*"

49. At the hearing before me, Mr Bayfield put his submissions principally on the basis of the wording underlined in the quotation above. I am satisfied that, as a matter of construction, that wording confers exclusive jurisdiction on the English Courts in respect of proceedings brought against the SSN Holders/Scheme Creditors by the Company (i.e. the Acceding Co-Issuer, using the language of the amendment). It also seems to me that the present are such proceedings, and so I conclude that if the present proceedings *do* fall within the scope of the Regulation, the English Court has jurisdiction over the Scheme Creditors by virtue of their agreement as reflected in the Trust Deed. Although not strictly necessary for me to say so, I think the same result follows from the non-exclusive jurisdiction clause in the first sentence of Section 14.05(a) of the Trust Deed.

50. Mr Bayfield submitted that jurisdiction over Scheme Creditors was also made out under the Regulation, Art. 8. Art. 8(1) provides that a person domiciled in one Member State may also be sued:

> " *… (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*".

51. In the present case, the Company's evidence is that it has identified 37 Scheme Creditors who are domiciled in England. The Company's submission is that the presence of such Scheme Creditors within the jurisdiction provides a basis for other EU domiciled Scheme Creditors to be sued here as well. The 37 Scheme Creditors hold in excess of €214 million of the Existing SSNs by value. €214 million represents approximately 14.73% of the liabilities compromised by the Scheme.

52. Of course, Mr Bayfield's submission on Art. 8 is of no real significance if the conclusion already expressed above as to Art. 25 is correct. It is also narrower in scope, in the sense that jurisdiction under Art. 8 can be established only in

respect of Scheme Creditors domiciled elsewhere in the EU, whereas jurisdiction under a prorogation agreement under Art. 25 is effective against all parties to that agreement, wherever they are domiciled. Nonetheless, I was told that the convention is to consider this question, since it addresses the point that if the Regulation *is in fact* applicable, and if otherwise no alternative basis of jurisdiction is available, creditors domiciled elsewhere in the EU can be sued only in the place of their domicile (see Regulation, Art. 4).

53. Snowden J. has suggested that 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*": see e.g. Re Van Gansewinkel Groep BV [2015] Bus LR 1046 (Ch) at [51] (Snowden J). It is for this reason that the Company has identified the 37 Scheme Creditors referred to above, and it says that they represent a sufficiently large number, and that their holdings are sufficiently large, to justify the Court taking jurisdiction if Snowden J's approach is the correct one. However, in Re DTEK Finance plc [2017] BCC 165 (convening hearing before Newey J) and [2016] EWHC 3563 (Ch) (sanction hearing before Norris J), Norris J and Newey J held that it was sufficient if a single creditor was domiciled in the UK. Trower J reached the same conclusion in Re Lecta Paper UK Ltd [2020] EWHC 382 (Ch) at [48]. Likewise, in Re Swissport Fuelling Ltd [2020] EWHC 1499 (Ch) at [60], Miles J held that a single UK-domiciled creditor is sufficient to engage Art. 8(1).

54. Speaking for myself, I incline to the view that the presence of a single creditor is a necessary, but not of itself a sufficient, condition to the operation of Art. 8. I say that because in terms the power conferred by Art. 8 is engaged where "*any one of*" a number of defendants is domiciled in England & Wales, but even then the power is to be exercised only in cases where the language of the proviso in Art. 8 is satisfied – i.e., where the claims against the various defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. I did not hear detailed argument on the meaning of this language, and in any event the application before me was uncontested, and so I express my view on it somewhat tentatively; but tentatively it seems to me that the question of

expediency posed by the proviso is rather less about the geographical distribution in terms of number and size of the prospective defendants, and is rather more about the expediency in case management terms of connected claims being resolved in one place, even if only one anchor defendant is domiciled there. The argument in this case is that it is expedient for the claims against all EU domiciled Scheme Creditors to be resolved in one place, i.e. in England & Wales, because such claims all relate to the reorganisation of their indebtedness vis-à-vis the Company, and these Courts are best placed to resolve such questions given the separate jurisdiction they exercise over the Company under CA Part 26. Indeed, they may be uniquely placed to do so.

55. Tentatively, therefore, I conclude that jurisdiction under Art. 8 is also made out against any EU domiciled Scheme Creditors. I reach that conclusion on the basis that a number of defendants are domiciled in England & Wales, and the nature of the claims against them is such that it is expedient for them to be resolved in the same place at the same time.

Class Composition

56. The basic principle is that a class "*must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 (Bowen LJ) and Re UDL Holdings Ltd [2002] 1 HKC 172 at [27] (Lord Millett NPJ).

57. The proper approach to this question focuses both on the rights of the relevant creditors without the proposed scheme, and the rights they are to have if the scheme is implemented. It is the *legal* rights of creditors which are relevant, and not their separate commercial or other interests. Such rights need not be absolutely identical: even material differences are permissible as long as they do not make it impossible for the creditors to consult together, and one must not be "*too picky*" in addressing the question of class composition (see Neuberger J. in Re Anglo American Insurance Co Ltd [2001] 1 BCLC 755 at 764).

58. In the present case, the comparison invited by this approach is between (i) the rights of the Scheme Creditors in the event that the Scheme is not approved –

i.e. the rights they will have in the event of an accelerated sale of the Group's assets; and (ii) the rights they will have if the Scheme is approved and implemented.

59. Taking this approach, and although Mr Bayfield has drawn my attention to a number of possible points of difference, I am satisfied that there need be only one class of Scheme Creditors:

    i) Looking at the Scheme Creditors' present rights, it seems to me that these are effectively the same. I think Mr Bayfield is correct to say that the Scheme Creditors are all the ultimate beneficial owners of the Existing SSNs and they all benefit from a common security package and have the same ranking under the Intercreditor Agreement. This means Scheme Creditors would all have the same rights and would be treated in the same way in the event of an accelerated sale of the Group's assets, and would all be eligible to receive a *pro rata* share of the proceeds of sale - estimated by BDO to produce a total return for SSN Holders of approximately 50.2% - in accordance with the Intercreditor Agreement.

    ii) Under the Scheme if approved, the Scheme Creditors will again be treated in the same way, in the sense that they are each eligible to receive a proportionate number of New 1L Notes, New 2L Notes and Class A Preference Shares (calculated by reference to their existing holdings), resulting in them each receiving, if the Scheme is approved, approximately 60.5% of the principal aggregate amount of the Existing SSNs (plus accrued but unpaid interest), together with the other possible benefits referred to by Mr Schneiter.

60. I should deal with four points which have been drawn to my attention which might be said to push against my overall conclusion. I do not consider that they alter my view, however.

61. *Different interest rates and currencies*: As noted above, two series of the SSNs have a fixed interest rate of 5.875% and the other has a floating interest rate of EURIBOR + 5.375%. I was referred by Mr Bayfield to a number of authorities in which the Court has held that small differences in relevant interest rates do

not fracture the class: see, e.g., Re ED&F Man Treasury Management plc [2020] (Ch) at [11], per Zacaroli J. Mr Bayfield properly pointed out that in many such cases, the comparator to the Scheme was an imminent insolvency proceeding, and one can quite readily see why in such cases, if the projected outcome on insolvency is a very limited (or nil) return to creditors, minor differences in interest rates are of no real significance. The comparator here is not an imminent insolvency proceeding, but nonetheless is an accelerated sale in which the Scheme creditors are projected to receive only about 50% of the amounts due to them. Looked at in that context, I agree that the differences in interest rates are small and do not have the effect of fracturing the class.

62. Two of the series of Existing SSNs are denominated in EUR and one in CHF. The Scheme proposes that the New 1L Notes, New 2L Notes and Class A Preference Shares are denominated in EUR. As regards the Existing SSNs , I agree that a mere difference in currency does not represent a meaningful difference in rights. I also note that the Scheme includes a mechanism under which the CHF Holders can elect to receive their new debt and equity securities in CHF if they wish to do so.

63. *Lock-Up Fee*: As described above, a Lock-Up Fee equal to 0.25% of the Existing SSNs held by each signatory to the Lock-Up Agreement is payable in cash on completion of the Restructuring. In order to qualify, Scheme Creditors must have acceded to the Lock-Up Agreement by 21 September 2020. I do not consider that the Lock-Up Fee has the effect of fracturing the class:

i) For one thing, the entitlement to enter into the Lock-Up Agreement, and therefore to claim the Lock-Up Fee, was made available to all Scheme Creditors. Indeed, approximately 81% of them have now acceded to the Lock-Up Agreement and in principle are entitled to the Fee. On that basis, Mr Bayfield's submission was that the entitlement to claim the Lock-Up Fee is properly to be regarded as an additional right conferred by the Scheme to Scheme Creditors. I agree with the substance of this point, at least in the sense recently described by Falk J. in Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) at [37], when she said of the lock-up fee in that case that "*although not strictly available under the terms of the*

Scheme it has in reality been made available to all Scheme creditors and may in practice be regarded as a right conferred by the Scheme, in the sense that it will become effective … if the restructuring is implemented." In my view the same logic applies here.

ii) Alternatively, I do not consider on the facts of this case that the Lock-Up Fee is likely to exert a material difference in the Scheme Creditors' voting decisions. To put it another way, in context I see no material difference in terms of their voting decisions between the position of a Scheme Creditor who is entitled to the Lock-Up Fee and one who is not. That is because of the nature of the decision to be made, which in substance is between either (1) voting to maintain the present structure, in which Scheme Creditors have the rights conferred by the Existing SSNs and the associated security package, including the subordination provisions of the Intercreditor Agreement (likely to lead, on the evidence, to distributions to Scheme creditors based on BDO's estimated total 50% return of amounts presently due to them), and (2) voting to support the Scheme and receive new debt instruments and securities in exchange for the Existing SSNs (the new debt instruments corresponding in value to approximately 60.5% of the amounts presently due, excluding accumulated interest). In the context of a decision of that type, I do not consider that the availability to some Scheme Creditors of a Lock-Up Fee of 0.25% is likely to represent a material point of difference, making it impossible for them to consult together with other Scheme Creditors having no entitlement to the Lock-Up Fee. There is much more to unite the Scheme Creditors in such a scenario than to divide them. I note that that decision is consistent with the reasoning of Falk J. in in Re Codere Finance 2 (UK) Ltd [2020] EWHC 2441 (Ch), at [105]. I also note the concerns expressed by Snowden J. about a total 0.5% consent fee in Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch), at [107]-[108], but that was a case on different facts which did not (as here) involve a comprehensive balance sheet restructuring.

64. *AHG Advisers' Fees:* The AHG has had the benefit of advice from both legal advisers and financial advisers. The *Group* has entered into arrangements to cover the costs, charges and expenses incurred by the AHG. Although the detail of these arrangements has not been made available, they are referred to in the Practice Statement Letter. They are said to be reflected in fee arrangement letters entered into on 12 August 2020, in relation to the financial advisers, and on 14 August 2020, in relation to the legal advisers.

65. As explained to me, the fee arrangement with the legal advisers provides for remuneration on a time-cost basis, but that with the financial advisers provides for the quantum of the fee payable to depend (in part at least) on whether the Scheme is successfully implemented. As to the latter point, Mr Bayfield explained that payment of a success fee is a standard form of remuneration for a financial adviser, and said that in a number of earlier cases the Court had proceeded on the basis that payment of a success fee to the financial advisers of a sub-group did not result in the fracturing of an otherwise coherent class of creditors.

66. Although I initially had some reservations on this point, because of the limited information available in relation to the fee arrangements, ultimately I was satisfied on the basis of the information provided that those arrangements do not fracture the single class of Scheme Creditors.

67. Mr Bayfield submitted that one reason for this was that, because the Group agreed to pay the advisers' fees on the basis of fee letters entered into August 2020, well before the Lock-Up Agreement was entered into in September, the arrangements for payment of the advisers' fees should be regarded as independent of the Scheme altogether and so should not form part of the present analysis (this was the approach adopted by Falk J. in <u>Re Codere Finance 2 (UK) Ltd</u> [2020] EWHC 2441 (Ch)). I am not persuaded of that point on the facts of this case, however, because the nature of the relationship between the fee arrangements and the Lock-Up Agreement (and the Scheme more generally) is somewhat obscure. I therefore prefer to state my conclusion on a different basis,

which is that I find it difficult to see, either as regards the agreement to pay the legal advisers or that to pay the financial advisers, that in substance these arrangements conferred any "*bounty*" or net benefit on the AHG (to adopt the terminology used by Snowden J. in Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch) at [113]). The members of the AHG themselves are not receiving any payment under the fee arrangements. Instead, all that is happening is that fees and disbursements associated with the performance of their role are being borne by someone else. That may be said in one sense to put them in an advantageous position vis-à-vis other Scheme Creditors, but in my view it does not do so in any materially relevant way. The commercial substance of it is not really in the nature of a *benefit* conferred on parties who agreed to become members of the AHG, but rather more in the nature of an arrangement that they should not be out of pocket for agreeing to do something they would not have done at all absent the Scheme and the Restructuring (see on this point the reasoning expressed by Falk J. Codere Finance 2 (UK) Ltd [2020] EWHC 2441 at [103]). If, properly characterised, this is a relevant *right* for class composition purposes, it is not in my view of such a character as to fracture the class of Scheme Creditors, because it is not material to the basic choice all Scheme Creditors have to make.

68. *Customary Confirmations:* I have explained above that, pursuant to the Account Holder Letter, the Scheme Creditors must make certain customary confirmations with respect to US Securities law and EU Regulation, in order to certify their ability to receive their allocation of New Notes and Class A Preference Shares.

69. It is possible that some Scheme Creditors may not be able to make the relevant confirmations. Nonetheless, I am satisfied that the requirement does not fracture the class. That is because a Scheme Creditor who is unable to make the confirmations may nominate a person to receive their allocation of New Notes and Class A Preference Shares on their behalf. I am told by Mr Bayfield that this basic structure is a customary feature of every scheme that involves the issuance of new debt or equity securities. In Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19], Zacaroli J. said that although it does give rise to a

situation in which there is a difference in the rights conferred by the proposed scheme, the difference is not such as to render the affected scheme creditors incapable of consulting with other scheme creditors with a view to their common interest. Mr Bayfield urged me to adopt that analysis and I gratefully do so.

Notice, Timing & Conduct of Scheme Meeting

70. Four further points remain to be dealt with.

Timing

71. The proposal at the hearing before me on 2 October 2020 was for a meeting of Scheme Creditors to be held on 21 October (19 days after the hearing), with the deadline for provision of Account Holder Letters to be 19 October (17 days after the hearing).

72. On the footing that notice would be given to the Scheme Creditors as soon as practicable after the hearing on 2 October, I was (and am) satisfied that these time periods were adequate for consideration by Scheme Creditors of the Explanatory Statement to be circulated to them setting out the terms of the Scheme. I understand that similar (and indeed shorter) periods have been approved in other cases.

Form of Meeting

73. Given the circumstances created by the present COVID-19 pandemic, it is proposed that the Scheme Meeting be held virtually by webinar. Details are given in the Explanatory Statement. This seems to me to be unobjectionable and indeed appropriate. I was referred by Mr Bayfield to Trower J's analysis in Re Castle Trust Direct plc [2020] EWHC 969 (Ch), and in particular to his comments at [42]-[43] as to the essential nature of the scheme meeting being a "*coming together*" with the ability to consult. Again, I gratefully adopt that analysis and conclude that the proposed arrangements in this case are satisfactory, subject of course to any points that may be made at the sanction hearing as to the efficacy of those arrangements in practice.

Declaration

74. I was asked to make a declaration that Mr Schneiter has been validly appointed as the Company's foreign representative for the purpose of seeking recognition of the Scheme under Chapter 15 of the US Bankruptcy Code. I was shown the Board Minutes so authorising him, and was content to make the declaration on the basis that it serves the practical purpose of providing formal Court certification of Mr Schneiter's appointment which is likely to be of assistance in managing aspects of the Scheme's implementation in the United States.

Order under CPR 5.4D(2)

75. Finally, I was asked to make an order pursuant to CPR 5.4D(2) for notice to be given to the Company of any application made by a person to obtain a copy of a document from the Court file. This was on the basis that the financial information contained in the Explanatory Statement and the evidence is commercially sensitive. I was satisfied as to the appropriateness of such an order, which does not preclude access to documents on the Court file by persons other than the Scheme Creditors, but merely provides for notice to be given if an application is made, so that the requirement for maintaining confidentiality can be considered in detail if needed: see Re Virgin Atlantic Airways Limited [2020] EWHC 2191 (Ch) at [67], per Trower J.