Case No: CR-2020-004268
Neutral Citation Number: [2020] EWHC 3455 (Ch).

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

The Rolls Building
7 Rolls Buildings
Fetter Lane London
EC4A 1NL

Thursday, 26 November 2020

BEFORE:

SIR ALASTAIR NORRIS

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IN THE MATTER OF:

STEINHOFF INTERNATIONAL HOLDINGS N.V.

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Mr Mark Arnold QC, Mr Adam Al-Attar and Mr Ryan Perkins instructed by **Linklaters LLP** for the Claimant

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APPROVED JUDGMENT

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SIR ALASTAIR NORRIS:

1. Steinhoff International Holdings N.V. ("the Company") is a company incorporated in the Netherlands. It is a holding company, and its principal place of business is in South Africa. Its operating subsidiaries are retailers of household goods, and they operate in some 30 countries in Europe, North America, Africa and Australasia. At the material times with which I am concerned, the shares have been listed in Frankfurt and in Johannesburg.

2. By way of background, in December 2017 the Company announced that it was possible that its financial statements had contained misinformation about the level of its profits. Unsurprisingly, this led to the commencement of shareholder litigation in several jurisdictions. Claims were brought by shareholders who had bought shares in the market and had claims in tort, and by shareholders who had acquired shares directly from the Company by subscription or in exchange for assets or businesses and had contractual claims. There are certain other claims which do not fall into either of those categories, and I have been referred to one such in the course of this hearing. The discovery also led to an inability to raise new loans, a cancellation of available commitments and threats to review existing drawn facilities. Those pressures generated financial distress for the group of which the Company forms part and led to the need to create a breathing space whilst the fundamental problems were addressed, and in particular steps were taken to manage or resolve the litigation. This was achieved in a 2019 restructuring.

3. The group's funding relied amongst other things on two facilities, Facility A1 and Facility A2, extended to a group company, Steenbok Lux Finco 2 S.á r.l. ("SEAG"). These facilities were governed by English law and had an asymmetric English law jurisdiction clause. The 2019 restructuring consisted in part of a CVA promoted by SEAG, under which the maturity of its indebtedness under Facilities A1 and A2 was extended so that the facilities now expire in December 2021. But as part of this restructuring, the Company provided a capped indemnity in relation to Facility A1 and Facility A2 by means of a contingent payment undertaking. This has been called "the SEAG CPU" in these proceedings. It created a self-standing, unsecured claim against the Company by the lenders under Facility A1 and Facility A2. Under an intercreditor agreement and pursuant to the terms of the SEAG CPU, Facility A2 is subordinated to Facility A1.

4. As I have said, the foregoing account relates only to part of the 2019 restructuring. I would in addition note that the Company also entered into other contingent payment undertakings relating to other indebtedness. As matters stood at the end of September 2020, the Company's exposure under the SEAG CPU was some €5.5 billion, and the Company's exposure under all CPUs which it had entered was some €9.18 billion.

5. On 27 July 2020 the Company announced a proposal for settlement of all litigation against the Steinhoff Group; and this was revised in October 2020. It had involved a year's complex negotiation with multiple parties. Its object was threefold: first, to provide a better outcome for claimants and for financial creditors than permitting the litigation to run its course; second, to allocate that benefit fairly between the

constituencies of claimants and financial creditors; thirdly, to enable the group to continue as a going concern.

6. It is unnecessary for the purposes of this judgment to spell out the structure of the proposed settlement, but it is necessary to note four features. First, it is, according to the Company's directors, at the margins of affordability and dependent upon a further extension of debt maturities to 30 June 2023, with a measure of flexibility to extend yet further in defined circumstances. Second, the 2019 restructuring contemplated that the group would explore settlement of the litigation, and it set parameters (the amount of the settlement sum, sources of funding the settlement and the elimination of certain contingent liabilities) within which a settlement could alone be achieved. The present proposals exceed those parameters. Thirdly, the group settlement includes a release by financial creditors of the Company of other group companies, directors, officers, auditors and external professional advisors in relation to those legacy accounting issues, and a release of directors, advisors and others in relation to post-December 2017 announcements. But those releases are not intended to form part of the scheme. There are releases in the scheme, but they relate to directors, officers and advisors in relation to actions relating to the scheme itself. Fourthly, for its full implementation the group settlement will entail engagement with compromise procedures in the Netherlands and in South Africa and, indeed, with their processes for achieving compromises with creditors. The outcome of those proceedings cannot be accurately predicted.

7. Financial documents including Facility A1 and Facility A2 and the 2019 restructuring each contain provisions enabling amendment of the terms if the requisite levels of consent can be obtained. The Company sought to implement these consent provisions and has gone some way toward achieving those. It achieved the requisite consent levels amongst all financial creditors save in respect of Facility A1 and Facility A2. These facilities and the intercreditor agreement governing them required unanimous consent, either actual or deemed. The Company almost achieved that, but 0.05 per cent by value of the Facility A1 lenders declined to give consent and refused it, and 6.6 per cent by value of the Facility A2 financial creditors also positively objected. These are accordingly “holdout” creditors under each facility.

8. In these circumstances the Company seeks to promote a scheme of arrangement with its Facility A1 and Facility 2 creditors in return for an extension of the maturity dates, the introduction of mechanisms for further postponements and amendments to consent levels, reducing to 80 per cent the current requirement for unanimity. The Company will, with effect from the settlement date of the group settlement, grant security in support of otherwise unsecured obligations under the SEAG CPU. It will grant a first ranking security over a subsidiary intermediate holding company which operates the South African operation and also over any loans due from that subsidiary to the Company. It is the view of the directors that if the scheme is not promoted or is not approved or is not sanctioned then the group settlement cannot proceed, and if the group settlement cannot proceed then the risk of adverse judgments is at such a level that they could not be satisfied, leading to liquidation of the Company and a slow realisation of its assets, that is to say, its holdings in its subsidiaries, in satisfaction of the unsecured claims of the Facility A1 and Facility A2 creditors amongst others.

9. The application before me seeks orders convening scheme meetings, and it is necessary to focus upon the issues relevant to such an order and to leave to the sanction hearing broader questions of fairness. The approach of the court to issues relevant to a convening order is well settled and indeed conveniently encapsulated in the Practice Statement of 26 June 2020. But it is well to emphasise that I am not at this stage concerned with the fairness of the scheme. I am concerned with jurisdictional questions, with whether it is obvious that there is a “roadblock” in the way of the sanction and with scrutiny of the arrangements for ascertaining the will of the scheme creditors.

10. In the instant case, the skeleton argument of Mr Arnold QC, Mr Al-Attar and Mr Ryan Perkins invites me to consider these issues under seven headings.

11. The first heading is "Notification of interested parties". I am invited to focus on and to weigh the factors which I identified as material in *NN2 Newco Ltd, Re* [2019] EWHC 1917 (Ch) at 26: shortly, the complexity of the scheme, the reality of consultation and the urgency to implement the scheme. The outline of the settlement and the necessity for amendment of the finance documents was effectively notified to creditors on 27 September 2020. The requirement for consent detailing the circumstances in which consent was being requested was manifest on 9 October 2020, when the consent requests were circulated. The Practice Statement letter was despatched on 4 November 2020. Its addressees were sophisticated commercial entities, including the purchasers of distressed debt. I have considered the Practice Statement letter, and I am satisfied that it put forward in concise terms, as is required, the essential elements of what the creditors were being asked to consider. In correspondence with objectors, no one has said that time has been too short or that insufficient information was provided in the Practice Statement letter. It will of course be supplemented by the Explanatory Statement due to be circulated prior to the scheme meetings, and I have considered that in its amended form, and my provisional view (the matter may have to be readdressed at sanction) is that it sufficiently explains precisely the questions which face the creditors and the factors which bear upon selecting an answer to those questions. In my judgment there has been sufficient notice of this hearing to enable any issues to be raised.

12. The second head of consideration is concerned with identifying the creditors. It is clear that the scheme creditors, as contingent creditors of the Company under the SEAG CPU, fall within the definition of “creditors” for the purpose of Part 26. They are indeed the beneficiaries of the payment clause in the SEAG CPU and are given direct enforcement rights. I see no issue arising and none has been suggested.

13. The third head of consideration is ascertaining whether the scheme is a “compromise” or “arrangement” with those scheme creditors. As was pithily summarised by Hildyard J in *Re Lehman Brothers International (Europe)* [2019] BCC 115 at [64], what is required is an element of give and take rather than a surrender or forfeiture of rights. Here, my short account of what is given up and what is acquired by the scheme creditors makes clear what it is that the scheme creditors gain. They also take the benefit of the group settlement which will forestall a collapse into liquidation, a liquidation that, as I shall indicate, would be disadvantageous to them.

14. An exercise has been undertaken by Analysis Group amounting to the preparation of a formal comparative analysis. It indicates that in a liquidation the finance creditors would stand to get something of the order of 3.7 cents in the euro on the face value of their debt. If one were to reduce the tortious and contractual claims to which I have referred from an estimate of €4.994 billion to half of that, the finance creditors' recovery would only increase to 4.4 cents in the euro. Of course, the reality of that choice will have to be addressed at the sanction hearing, but it is evident that that return and the circumstances of it underpin the "give and take" which is at the heart of this scheme.

15. The fourth head of consideration I am invited to undertake relates to class composition. The approach here is so well established and familiar that it is necessary only to note the lodestar decision in *Sovereign Life Assurance Co v Dodds* [1892] 2 QB 573 and to the observations of Bowen LJ at page 583 that a class is constituted by those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests. Applications of this principle were summarised by Hildyard J in *Re Primacom Holdings GmbH v Credit Agricole* [2013] BCC 201 at paragraphs [43] to [44], and I direct myself in accordance with those principles.

16. What is proposed is separate meetings of the Facility A1 and Facility A2 lenders on the simple basis that although both groups are treated identically under the scheme, as matters stand the latter is subordinated to the former and at greater risk of a nil return in an alternative liquidation scenario. Subordination does not necessarily require a separate class, but here it is a prudent approach where it is known that there is a significant objector within Facility A2 who might complain of a constitution of a single class being designed to reduce the traction of its objection amongst its peers. So, I approve the initial division into two classes.

17. The question then arises whether there should be a fracturing of either of those classes. There are three sub-issues. First, I noted that 88 per cent of the scheme creditors consented to the amendment. Under the terms of the solicitation of their consent, that constituted agreement to support any scheme promoted by the Company. It is well established that a voting agreement does not fracture the class, but the outcome may need to be addressed at the sanction hearing. There is no need for me to revisit any of this jurisprudence. It is sufficient to refer to the observations of David Richards J in *Re Telewest Communications plc* [2005] 1 BCLC 752.

18. The second sub-issue is that as part of the overall arrangements, it is agreed that certain advisors' fees are to be paid by other members of the group. This does not fracture the class. As the skeleton argument points out, these are existing historic obligations dating from the 2019 restructuring and do not create any obligations on the part of the Company.

19. The third sub-issue relates to cross-holdings. Approximately 90 per cent of the Facility A1 debt is held by entities which also own over 50 per cent of the Facility A2 debt. It is well established that cross-holdings do not of themselves fracture the class, though, once again, their existence may be an issue to be addressed at the sanction hearing. It is sufficient to refer to *Re Colouroz Investment 2 LLC and others* [2020] EWHC 1864 (Ch) at paragraph [88] where the matter is considered by Snowden J.

20. The fifth head I am invited to consider relates to jurisdiction. This gives rise once again to two groups of sub-issues. The first sub-issue is jurisdiction over the Company. I am satisfied that the Company is a company liable to be wound up under the Insolvency Act 1986 as an unregistered company and that the decision in *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433 at paragraph [9] applies. The question is whether it has a sufficient connection with this jurisdiction. This may be a question to be addressed at the sanction hearing, but, so far as I am concerned, at the convening hearing the SEAG CPU is governed by English law, the facility arrangements are governed by English law and, in my judgment, that provides a sufficient connection for a scheme which varies the terms of those documents.

21. The second sub-issue relates to jurisdiction over the creditors. Creditors domiciled in the EU raise particular issues. It is settled that schemes fall outside the scope of Insolvency Regulation (EC) 1346/2000. That is clear from the decision in *Re Van Gansewinkel Groep BV and others* [2015] EWHC 2151 (Ch) at [37] to [40] per Snowden J. I see no reason to depart from that decision. It is not settled whether the Recast Judgments Regulation (EU) No 1215/2012 applies. The settled practice is to assume that it does and then to enquire whether Article 8 or Article 25 provides a relevant gateway for English jurisdiction. I shall follow that course. I am satisfied that either or both of those gateways applies.

22. The SEAG CPU and the relevant intercreditor agreement include asymmetric jurisdiction clauses. In *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch) at paragraphs [39] to [41], I held that that engaged Article 25. That conclusion has found general acceptance, and there are other decisions reaching the same conclusion. As to the alternative gateway, at least one scheme creditor should be domiciled in the UK in order to engage Article 8. In fact, ten are so domiciled. Whether, as I think, the domicile of one suffices to found jurisdiction and whether that jurisdiction is properly exercised is a question for sanction, or whether (as is an alternative view) a significant number domiciled in England and Wales is required in order to make it expedient to accept jurisdiction matters not. By either route, Article 8 is satisfied. So, there are no issues relating to jurisdiction over creditors.

23. The sixth head I am invited to consider is that of "effectiveness". I have been referred to and have read the expert opinions of Michael Fitzgerald SC and of Roger Wakefield for the South African jurisdiction and that of Dr Dennis Faber as to Dutch law. I bear also in mind the general recognition in international law that discharge of an obligation is governed by the law of the obligation. Again, this is a question which will have to be re-examined at sanction, but at present I see no objection in the way of convening meetings.

24. The seventh matter is to consider generally whether there is any defect or other obvious roadblock. My attention has been drawn to four provisions. The first is that the scheme operates by way of the appointment of attorneys to act for scheme creditors in the execution of the implementation documents. This does not present a "roadblock". It is an established means of proceeding. I need only refer to *Re Colouroz Investment 2 LLC and others* [2020] EWHC 1864 (Ch), this time at paragraphs [74] to [75]. Secondly, the scheme involves amendment to the consent levels required under the various facility documents and intercreditor agreements. This again presents no

obstacle. As was made clear by Miles J in *Re Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) at 40 to 41, such provisions are entirely effective. Third, the scheme incorporates a release of the Company and of its advisers in relation to the preparation and implementation of the scheme. This is now an established feature of many schemes and does not of itself constitute a "roadblock": *Re Noble* [2019] BCC 349 at [20]-[30].

25. The fourth provision relates to the implementation of the group settlement scheme. The scheme is intended to facilitate the implementation of the group settlement, and its terms become effective when that settlement itself becomes effective. So, the scheme is dependent in part on the outcome of procedures in the Netherlands and in South Africa which cannot at present be known. But there is not such a level of uncertainty about the acceptability of the scheme (which has already received widespread support as a result of the consent solicitation) as to drive the Court to the view that the approval of the settlement as so unlikely as to render a convening meeting a pointless exercise. The question has arisen in the context of whether the court should grant sanction where the scheme is a part of an overall restructuring which involves a CVA where the CVA is under challenge. The point was before Zacaroli J in *Re New Look Financing plc*, [2020] EWHC 2793 (Ch) and before me in *Re PizzaExpress Financing 2 plc* [2020] EWHC 2873 (Ch), both sanction hearings. Zacaroli J and I shared the view that the desirable position was to put the pieces of the jigsaw on the table and then to see whether in the events it was possible to slot them together. The test to apply is to assess whether acceptance of the CVA in that case or acceptance of the group settlement agreement in this case is a fanciful prospect. At this stage it is certainly not fanciful, and uncertainty is not an obstruction in the way of convening meetings.

26. For these reasons I intend to grant a convening order. I have been invited to consider the period of notice given and the arrangements for the conduct of the scheme meetings. The suggestions contained in the draft order have plainly taken shape in the light of the observations of Trower J in *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) at paragraphs [42] and [43]. It is unnecessary for the purposes of this judgment to set out the terms of the convening order, but I am satisfied that it will achieve the objective of affording the creditors a sufficient informed opportunity to participate in a remote meeting at which the approval of the scheme will be before them for consideration. I therefore propose to make a convening order in that form.

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

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This transcript has been approved by the Judge