Neutral Citation Number: [2021] EWHC 184 (Ch)

Case No: CR-2020-004268

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

7 Rolls Building
Fetter Lane
London EC 4A 1NL

Date: 05/02/2021

Before :

MR JUSTICE ADAM JOHNSON

IN THE MATTER OF STEINHOFF INTERNATIONAL HOLDINGS N.V. AND IN THE MATTER OF THE COMPANIES ACT 2006

Mark Arnold QC, Adam Al-Attar and Ryan Perkins (instructed by **Linklaters LLP**) for the **Applicant**
Tom Smith QC and Henry Phillips (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for **Conservatorium Holdings LLC**

Hearing dates: 26 – 27 January 2021

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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.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

Introduction

1. Steinhoff International Holdings NV ("*Steinhoff NV*" or "*the Company*") is incorporated in the Netherlands but its principal place of business is in Stellenbosch, South Africa. It is the ultimate holding company of the Steinhoff Group.

2. Steinhoff NV applies for an order sanctioning a creditors' scheme of arrangement ("*the Scheme*") pursuant to Companies Act 2006, section 896. The Scheme relates to two classes of creditors, both lenders under financing documents which I will describe below (I will refer to them as the "*Facility A1 Lenders*" and the "*Facility A2 Lenders*", or together, the "*Scheme Creditors*").

3. The Company issued the required Practice Statement Letter on 4 November 2020, and following a hearing before Sir Alastair Norris on 26 November, Sir Alastair made an Order (the "*Convening Order*") convening two scheme meetings of the Facility A1 Lenders and Facility A2 Lenders to be held on 15 December 2020. Sir Alastair's judgment given on the convening hearing is at [2020] EWHC 3455 (Ch).

4. Meetings of the Scheme Creditors have now taken place, and the vast majority, both in number and value, support the Scheme.

5. As I will explain below, however, a particular issue arises because of an objection to the Scheme by Conservatorium Holdings LLC ("*Conservatorium*"). Conservatorium is not a Scheme Creditor, but says it has a sufficient interest to justify its intervention. That is because the Scheme represents the first step in a more complex overall arrangement designed to achieve a global settlement of many disputes involving the Steinhoff Group (the "*Steinhoff Group Settlement*"). Those disputes arise out of alleged accounting irregularities affecting the Group which first came to light in late 2017, concerning possible overstatements of profits. Conservatorium is pursuing claims relating to the alleged irregularities, and says the proposals for settlement in the Steinhoff Group Settlement involve it being treated unfairly in respect of its claims. It says that because the present Scheme and the Steinhoff Group Settlement are connected, and in effect indivisible (its counsel, Mr Smith QC, used the vivid analogy of there being "*one big ball of wax*"), such unfairness must be relevant for this Court in assessing whether to sanction the Scheme. Indeed it is said to constitute a "*blot"* in the Scheme such that the Scheme should not be sanctioned.

6. A preliminary point was raised by the Company at the hearing before me, as to the standing of Conservatorium to intervene and make an objection at all. The parties agreed, however, that I should hear Conservatorium's submissions as part of an overall presentation of the Company's application for an order for sanction. I therefore agreed to hear Conservatorium's submissions *de bene esse*, on the basis that I would deal in this Judgment with the question of standing and, as necessary, with the substance of its objection. That is the approach adopted below.

Background

7. The Steinhoff Group operates in the household goods and general merchandise sectors. Among the members of the Group are Steinhoff International Holdings Proprietary

Limited ("*SIHPL*") and Steenbok Lux Finco 2 Sarl (referred to as "*SEAG*"). SIHPL is incorporated in South Africa. It is important because (prior to 2015) it was the main holding company in the Group. It is now a subsidiary of Steinhoff NV. SEAG is also a subsidiary company. It is important because it is party to the key financing documents sought to be amended by the present Scheme.

8. The suspected accounting issues announced in late 2017 caused huge turbulence within the Group, including to its relationships with its lenders. Its financing arrangements at the time included Facility A1 and Facility A2, in favour of SEAG. These facilities are governed by English law and contain submissions to the jurisdiction of the English courts.

9. In 2019, a restructuring of the Group's overall indebtedness was achieved *("the 2019 Restructuring*"). The objective was to buy some breathing space, to allow time to see whether the Group could weather the storm which followed the emergence of the accounting issues I have mentioned. It was hoped that by creating some breathing space, it might be possible for an overall settlement of the many disputes affecting the Group to be negotiated.

10. Among the arrangements affected by the 2019 Restructuring were Facility A1 and Facility A2 with SEAG. A number of changes to those Facilities were brought into effect. The relevant maturity dates were extended, and presently expire in December 2021. Further, by means of a new contingent payment undertaking, referred to as the "*SEAG CPU*", Steinhoff NV gave what is in effect a guarantee (subject to an agreed cap) in respect of SEAG's indebtedness to the Facility A1 and Facility A2 Lenders. Thus, the Facility A1 and A2 Lenders became contingent, unsecured creditors of Steinhoff NV, the promoter of the present Scheme. By means of an intercreditor agreement ("*the SEAG Intercreditor Agreement*"), Facility A2 was subordinated to Facility A1.

11. The Group had other facilities in addition to Facility A1 and Facility A2. The other facilities had the benefit of their own CPUs. The interrelationship between the SEAG CPU and the other CPUs came to be governed by a document known as the "*Umbrella Agreement*".

12. By September 2020, the Company's exposure under the SEAG CPU was €5.5bn and under all CPUs was some €9.8bn.

13. I mention the SEAG CPU and the SEAG Intercreditor Agreement in particular because a key purpose of the present Scheme is to put arrangements in place which will result in their being amended on behalf of the Facility A1 and A2 Lenders. The need to achieve that objective by means of a scheme of arrangement has arisen as follows.

14. As noted, the 2019 Restructuring contemplated that efforts would be made to achieve a global settlement. The package of agreements which gave effect to the 2019 Restructuring set parameters for any settlement, including as to such matters as the settlement sum and the sources of funding for the payment of any such sum.

15. In June 2020, after a year of complex negotiations, the Group announced a proposal for a global settlement. This was the first iteration of the *Steinhoff Global Settlement* already mentioned. There was an issue, however. The proposed terms were outside

the approved parameters required by the 2019 Restructuring, and reflected in the documents I have mentioned. Also, more time was needed, and so the Group looked to extend the maturity dates settled on in the 2019 Restructuring.

16. The documents constituting the 2019 Restructuring contained consent provisions, permitting amendments to be made subject to certain approval thresholds being met. In October 2020, a process of seeking consents was initiated under the relevant contractual mechanisms. The short point is that the relevant majorities were achieved in the majority of cases, but not all. Certain amendments affecting the Facility A1 Lenders and Facility A2 Lenders required unanimous consent, and that was not forthcoming. One Facility A1 Lender (holding 0.05% of Facility A1 by value) declined to give consent, and two of the Facility A2 Lenders (holding 6.6% of Facility A2 by value) voted against the proposed amendments. I understand that those Facility A2 Lenders are associated with Conservatorium.

17. Thus it comes about that the Company seeks to promote the present Scheme. It does so in order to effect amendments to the arrangements in place with the Facility A1 and Facility A2 Lenders, and those amendments are necessary to facilitate implementation of the hoped for Steinhoff Global Settlement. At the heart of the present Scheme is a proposal that authority be conferred on appointed agents of the Scheme Creditors to execute a suite of implementation documents on their behalf, following the practice described by Snowden J. Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch) at [74]-[75].

18. The two key implementation documents are:

    a) An agreement to amend the SEAG CPU ("*the SEAG CPU Amendment Agreement*"), and

    b) An agreement to amend the SEAG Intercreditor Agreement (the "*SEAG ICA Amendment Agreement*").

19. Among the key proposed amendments is an extension of the Maturity Date under the SEAG CPU from 31 December 2021 to 30 June 2023, and a reduction in the consent threshold required to effect further changes to the SEAG CPU and the Umbrella Agreement from "*all Lenders*" to an 80% majority by value.

20. The Scheme also includes a release of the directors of the Company, professional advisers and various other persons from any liability arising out of or in connection with the preparation, negotiation or implementation of the Scheme. Essentially the same provision was approved by Snowden J in Re Far East Capital Ltd SA [2017] EWHC 2878 (Ch) at [13]-[14], and Re Noble Group Ltd [2019] BCC 349 (sanction judgment) at [20]-[30].

21. Finally, I should mention that although there is some uncertainty about the form they will take, the intention is that the present (English) Scheme will need to be followed by other, more extensive restructuring processes in the Netherlands and in South Africa. In the Netherlands, it seems that the likely format will be a Suspension of Payments (*surseance van betaling*) procedure, although Mr du Preez in his evidence has referred to the Company also giving consideration to the new Dutch "*WHOA*" procedure (*Wet homologatie onderhands akkoord*), which became available from 1 January 2021. In

South Africa, what is proposed is a compromise plan pursuant to section 155 of the Companies Act No. 71 of 2008. During the course of the hearing before me, the Company produced a copy of a draft section 155 Proposal recently submitted to the South African Court. This document is consistent with the idea that the corresponding procedure in the Netherlands will be the Suspension of Payments procedure, and Mr Al-Attar, who appeared for the Company, accepted that that was likely to be the case, although I understood the Company's position to be that no final decision had been taken.

22. I should also say for completeness that, not content to wait for Steinhoff NV to make a decision as to the proposed course in the Netherlands, on 4 January 2021 Conservatorium made its own application to initiate the appointment of an independent and impartial restructuring expert under the WHOA procedure. That application is pending, and as I understand it, is likely to be resisted by Steinhoff NV.

Conservatorium

23. At this point, and before summarising the Steinhoff Global Settlement and the features of it which Conservatorium finds objectionable, it is convenient to say something briefly about the claims which Conservatorium says it is entitled to bring against members of the Steinhoff Group.

24. I have been given a great deal of background, but I will do my best to summarise the key points. This comes at some risk of oversimplification, but not at the cost of precision on the key issues, and it is necessary I think in order to explain clearly the very complex and fragmented background.

25. There are two relevant sets of claims. Both have their origin in the acquisition of shares in Steinhoff Group companies, at a time before the accounting issues mentioned above first emerged, and thus at a time when it is alleged that the relevant share prices were artificially inflated. By way of shorthand, I will refer to the two sets of claims as the "*Thibault Claim*" and the "*Upington Claim*" respectively. By that language I mean to include all claims and causes of action arising from the events I will now describe.

26. The background to the claims overlaps. It is convenient to mention the Thibault Claim first. Thibault Square Financial Services Proprietary Limited ("*Thibault*") is a company associated with Dr Wiese, the former Chairman of the Steinhoff Group. In November 2014, Thibault subscribed for 609 million shares in SIHPL, which at the time was the Group holding company. In December 2015, the Group structure changed, and the shares in SIHPL were exchanged for an equivalent number of shares in Steinhoff NV by means of a South African scheme of arrangement. Steinhoff NV became the new Group holding company. Causes of action in misrepresentation and the like are said to have arisen both on the original acquisition of shares by Thibault in 2014, and on the exchange of SIHPL shares for Steinhoff NV shares in 2015. Together these causes of action constitute the *Thibault Claim*.

27. Later, in 2016, another company associated with Dr Wiese, Upington Investments Holdings BV ("*Upington*"), also wished to purchase shares in the Group. The purchase was financed by means of a loan raised in late September 2016 from a consortium of banks. This has been referred to as the "*2016 Margin Loan.*" More particularly, this

was a €1.65bn limited-recourse margin loan facility with Upington and an entity called Titan Investment Proprietary Limited ("*Titan*"), also associated with Dr Wiese.

28. Using the 2016 Margin Loan, Upington purchased 314 million shares in Steinhoff NV. Causes of action are also said to have arisen on that acquisition, and it is those causes of action which constitute the Upington Claim.

29. The lenders under the 2016 Margin Loan took security, including from Upington and Thibault. Upington gave security over the 314m shares it acquired using the 2016 Margin Loan, and Thibault gave security over 314m of the shares it by that stage held in Steinhoff NV. Of course, the 314m were only a subset of the 609m Thibault had obtained by means of the 2015 scheme, and according to Mr du Preez's evidence, Thibault's overall holding of shares in Steinhoff NV was even larger than that, because it had acquired other shares over time from dividends in kind and from separate share purchases in the market.

30. At the same time, in the Autumn of 2016, it seems that an exercise was being conducted to consolidate the Wiese family shareholdings in Upington. Thus, Thibault came to transfer its shares in Steinhoff NV to Upington. This was achieved by means of a Dutch law governed "*Asset-for-Share Exchange Agreement*" dated 5 October 2016.

31. The upshot was that Thibault dropped out of the picture and, so far as relevant for present purposes, Upington became the sole security provider. Again according to Mr du Preez, Upington eventually came to pledge a total of 750m shares in Steinhoff NV to the Margin Lenders, including within that overall total the 314m it had acquired directly. For reasons which will appear below, it will be convenient to refer to the shares subject to these security arrangements as the "*Charged Shares*." This is the language of a series of English law governed security agreements (the "*2016 Security Agreements*") which formed part of the security agreed with the lenders under the 2016 Margin Loan.

32. Some time later, in June 2017, the 2016 Margin Loan and the 2016 Security Agreement were replaced by a new "*2017 Facility Agreement*" and new "*2017 Security Agreements.*" Like the 2016 Security Agreements, the 2017 Security Agreements were governed by English law. The "*Charged Shares*" under the 2016 Security Agreements became Charged Shares under the 2017 Security Agreements. The 2016 and 2017 Security Agreements are critical documents because it is by virtue of these agreements that Conservatorium asserts its entitlement to advance the Upington and Thibault Claims.

33. I will come back to that point, but to continue the chronology for now, following the announcements about possible accounting irregularities made in late 2017 and early 2018, there was a collapse in the Company's share price and consequently an Event of Default under the 2017 Facility Agreement. The lenders' security rights were exercised, and the Charged Shares were appropriated and sold. However, that still left a shortfall owing under the 2017 Facility Agreement of some €993m.

34. Now comes the issue. Conservatorium is not the only party which claims the entitlement to pursue the Thibault and Upington Claims. There are competing claimants. Thibault and Titan say that in fact *they* are the parties properly entitled to pursue the Thibault and Upington Claims, Titan's position being that Upington ceded

its rights to Titan in September 2018 before being dissolved. To put it another way, there is a contest over ownership of those claims.

35. In fact, it was Upington and Thibault who first took action. In April 2018 those parties started proceedings in South Africa seeking damages and other relief in connection with the Thibault and Upington Claims - i.e. damages arising from the acquisition of shares in SIHPL undertaken originally by Thibault in 2014 (those shares later having been exchanged for shares in Steinhoff NV), and separately, damages arising from the later acquisition of shares in Steinhoff NV by Upington in 2016. These South African proceedings are still ongoing.

36. After those proceedings were commenced, during 2019, Conservatorium came to acquire the interests of all but one of the Margin Lenders under the 2017 Facility Agreement, together with their rights under the 2017 Security Agreements. It presently holds 94% of the total rights and benefits under those agreements. Conservatorium's position in short is that the scope of security under those agreements included security over the causes of action comprising the Thibault and Upington Claims. Thus, it says it is now the true owner of those Claims (or of 94% of them), and is entitled to their fruits or proceeds.

37. Pausing there to elaborate a little on the nature of the contest between Thibault and Titan on the one hand, and Conservatorium on the other, critical as regards both the Thibault and Upington Claims is an issue of construction under the 2017 Security Agreements. I was shown one such Agreement as an example. Under the scheme of the Agreements, "*Charged Shares*", which I have already mentioned above, are treated as a form of "*Security Asset*." The definition of "*Charged Shares*" includes the shares together with "*all Related Rights.*" "*Related Rights*" are then defined to include, *"(b) any moneys or proceeds paid or payable deriving from that Security Asset*", and "(*c) any rights, claims ... in relation to that Security Asset*" (emphasis added).

38. Thus, Conservatorium say that the security granted over the Charged Shares included the causes of action accrued on (i) the 2014 purchase by Thibault of SIHPL Shares by in 2014, (ii) the exchange of the SIHPL shares for Steinhoff NV shares as a result of the 2015 scheme of arrangement, and on (iii) the later 2016 purchase of Steinhoff NV shares by Upington. All such causes of action were "*rights, claims*" in relation to the Charged Shares within sub-clause (c) of the definition of "*Related Rights.*" The security also included the right to receive the proceeds of such causes of action (see sub-clause (b)), which makes obvious good sense because as the English law authorities demonstrate, although a debt and its proceeds are conceptually two separate assets, it is commercially artificial to separate them in terms of ownership: "*An assignment or charge of a receivable which does not carry with it the right to receipt has no value. It is worthless as a security*" (per Lord Millett in Agnew & Anor. v. Commissioners of the Inland Revenue [2001] UKPC 28, [2001] 2 AC 710, at [46]).

39. These points are disputed by Thibault and Titan, who contend that the security granted by the 2016 and 2017 Security Agreements was narrower in scope, and although it included rights deriving from the Charged Shares themselves (such as the right to claim unpaid dividends), it did not extend to include causes of action for misrepresentation and the like arising on the acquisition of those shares.

40. This argument is of course relevant both as regards the Thibault Claim and the Upington Claim, because it is by virtue of its security interest that Conservatorium claims its entitlement to sue. Further points arise, however, as regards the Thibault Claim. That is because the original acquisition of shares in SIHPL in 2014 was by Thibault. It was only later, after those shares had been exchanged for shares in Steinhoff NV as a result of the 2015 scheme, that they came to be transferred to Upington by means of the Dutch law Asset-for-Share Exchange Agreement (mentioned above at [30]). And it was only after that that a proportion of them came to be pledged as Charged Shares by Upington.

41. Here, Thibault and Titan rely on two points. The first is that there is some admitted uncertainty about which shares ultimately came to be pledged by Upington as Charged Shares. The second point is that whatever "*Related Rights*" the security over those Charged Shares included, it *cannot* have included rights which were not transferred by Thibault to Upington under the Asset-for-Share Exchange Agreement. Again, therefore, an issue of construction arises, this time governed by Dutch law. Thibault and Titan say that only rights attaching to the shares themselves were transferred to Upington, and not causes of action arising on their acquisition (or on the subsequent exchange). Conservatorium says the opposite, relying on Clause 4 of the Asset-for-Share Exchange Agreement. This is headed "*Ownership, Risk and Benefit*" and provides in the relevant part that *"[o]wnership of and all risk in and benefits attaching to [the shares to be transferred] shall pass to Upington*." The contest between the parties focuses on the meaning and scope of this language.

42. To resume the narrative, Conservatorium having stepped into the shoes of the majority of the Margin Lenders lost no time in seeking to recover some value from the claims it considered itself to have acquired.

43. Although proceedings were already on foot in South Africa, Conservatorium initiated its own proceedings in the Netherlands. These started, on or about 23 July 2019, with an application for pre-judgment attachment in respect of the Upington Claim. On 24 July 2019, the Court granted relief in the form of an attachment of Titan's claims against Steinhoff NV in respect of the Upington Claim, in the amount of €438,569,706.95. Related to that pre-judgment attachment, Conservatorium then brought proceedings on the merits against certain Wiese entities, including Titan and Thibault, on 23 August 2019. Those proceedings have since become dormant, although the attachment remains in place.

44. Some time later, in January 2020, Conservatorium started a separate and more wide-ranging claim in the Netherlands, seeking relief against SIHPL and against Steinhoff NV in relation to both the Thibault Claim and the Upington Claim (and in relation to a further claim referred to as the "*Margin Lender Claim*", which we need not be concerned with).

45. Thus, there are concurrent proceedings on foot in both South Africa and in the Netherlands in relation to the Thibault Claim and the Upington Claim. In the South African proceedings Thibault and Titan are the claimants, and in the Dutch proceedings the claimant is Conservatorium.

46. To complicate matters further, Conservatorium then applied to be joined in the South African proceedings, and Titan and Thibault applied to be joined to the Dutch proceedings.

47. Following a hearing on 2 June 2020, the South African court granted Conservatorium's application for permission to intervene in a judgment issued on 3 September 2020. The South African Judge said at [102] of his Judgment: "*In my view, based on the undisputed and common cause facts the applicant clearly prima facie established that it has a real and substantial interest in the matter. The applicant has clearly established a legal interest or legal basis, based on this fact."*

48. Then on 23 September 2020, the Dutch court permitted Titan and Thibault to intervene in the Dutch proceedings, noting the existence of "*divergent views as to who is entitled to the claims in respect of the two Upington claims*" (meaning the Thibault Claim and the Upington Claim).

49. The upshot is that there is presently engagement in two sets of proceedings in two different jurisdictions, not only on the substance of the Thibault Claim and the Upington Claim, but also on the question of who is entitled to pursue those Claims.

50. This complicated picture is only part of the wider story which forms the backdrop to the Steinhoff Global Settlement, which I will now turn to.

The Steinhoff Global Settlement

51. There have in fact been two sets of proposals for the Steinhoff Global Settlement, the first in an initial Term Sheet circulated by Steinhoff NV on 27 July 2020 (the "*First Term Sheet*"), and the second in an amended term sheet (the "*Second Term Sheet*") dated 9 October 2020.

52. I will first summarise some headline aspects of the current proposal set out in the Second Term Sheet (and now carried though into the draft section 155 Proposal recently submitted to the South African Court), and then turn more specifically to Conservatorium.

53. The settlement proposal makes a distinction between persons who acquired shares in the market ("*Market Purchase Claimants*"), and those who acquired shares directly via subscription or like arrangements ("*Contractual Claimants*"). The headline offer is to pay a total of €887m to claimants in both categories by way of full and final settlement of all litigation claims against either SIHPL or Steinhoff NV. The settlement amounts are to be paid without any admission of liability: see for example para. 1.28, para. 4.17 and para. 45 of the draft section 155 Proposal. Moreover, the intended releases are very broad: para. 16.7 of the draft Proposal for example explains that the payments to be made to the "*Contractual Claimants*" are intended to be "*in full and final settlement*" of "*any and all claims of the Contractual Claimants of whatsoever nature, and however and whenever arising, [and] whether related to or based upon the Events [as defined] or otherwise … .*"

54. Other proposals are made specifically as regards financial creditors. These include terms allowing for extensions of the maturity dates of the existing facilities to 30 June 2023 (and with a further six months beyond that available in certain circumstances), and also the grant of new security by Steinhoff NV in favour of the counterparties to the various CPUs, including the present Scheme Creditors who are counterparties to the SEAG CPU. At present the Scheme Creditors' claims under the SEAG CPU are unsecured, but under the Steinhoff Global Settlement if implemented, the Scheme

Creditors will come to benefit from what I will call the new "*Steinhoff NV Security*." This is described in the Company's Skeleton Argument for the hearing before me as follows:

> *"(1) [The Steinhoff NV Security] is to comprise, with effect from the Settlement Effective Date, first ranking security granted by the Company over (i) its shares in SIHL, which is a holding company of the South African sub-group and (ii) any loan payable by SIHL to the Company and outstanding immediately following the Settlement Effective Date.*
>
> *(2) [The Steinhoff NV Security] will rank and secure the Company's obligations under the contingent payment undertakings executed by the Company (including the SEAG CPU) and the Company's obligations in respect of intragroup indebtedness pari passu and without any preference between them.*
>
> *(3) The security will be vested in a security agent on behalf of the secured creditors."*

55. I now come back to Conservatorium. Some brief history is necessary to understand its complaints.

56. Before the First Term Sheet, there had been correspondence between Conservatorium and Steinhoff NV's advisers, Linklaters LLP, about the treatment of the Thibault and Upington Claims. In a letter dated 24 June 2020, Linklaters LLP said the following in a passage in their letter addressing both the Thibault Claim and the Upington Claim:

> *" … what the Steinhoff Parties propose to do is to implement any Global Settlement in the interests of all stakeholders, reserving from any associated distributions amounts in respect of claims the ownership of which is in dispute."*

57. They then referred to any reserve in relation to the Thibault Claim being maintained "*as part of* the *Section 155 process*" (a reference to the intended process in South Africa under the South African Companies Act), and to any reserve in relation to the Upington Claim being maintained "*as part of the SOP process*" (a reference to the likely Suspension of Payments procedure in the Netherlands), and continued:

> *"Insofar as ownership disputes continue to exist in relation to these claims in the meantime, this will mean that distributions in respect of these claims (c.f. voting on the compromise or plan itself) will be delayed pending the determination of those disputes."*

58. Then, in a separate paragraph dealing with the Upington Claim, Linklaters LLP said:

> *"Steinhoff plainly cannot make payment to a party in respect of an alleged claim, in circumstances where there remains live*

> *litigation as to whether or not that party is the owner of the claim."*

59. At the heart of Conservatorium's assertion of unfairness is the submission that although the First Term Sheet in July 2020 recognised the principle set out in this last quotation, the later proposal in the Second Term Sheet of 9 October 2020 failed to do so, or more particularly, failed to do so as regards the Thibault Claim.

60. Both Term Sheets deal with the Thibault Claim in a section concerning SIHPL, and with the Upington Claim in a section concerning Steinhoff NV.

61. As regards the Thibault Claim, the proposal in the First Term Sheet was that SIHPL would recognise a contractual claim in respect of the shares issued to Thibault in 2014, but the Group would continue to dispute any other claims. As regards the contest over ownership, the Term Sheet said:

> *"SIHPL will consider paying any compensation attributable to a claim in which the ownership is disputed into escrow …".*

62. As regards the Upington Claim, the First Term Sheet proposed a settlement amount of EUR 82m, but only "*following resolution of the dispute between Upington/Titan and Conservatorium*."

63. In the Second Term Sheet, the proposal as regards the Upington Claim is the same, but as regards the Thibault Claim is different. The Thibault Claim is wrapped up with a number of other claims referred to collectively as the "*Titan Claims*", and the proposal is that:

> *" … SIHPL will pay to the Titan entities the respective settlement amounts notwithstanding any continuing ownership dispute."*

64. According to the section 155 proposal provided to the South African Court at para. 4.27.2, a total of Rand 7.9bn is to be paid in respect of the "*Contractual Claims of Thibault and Wiesfam*", Wiesfam being another company associated with Dr Wiese. The Thibault "*Contractual Claim*" refers to Thibault's claim arising out of its acquisition of shares in SIHPL in 2014, and so corresponds (in large part at least) to what I have referred to as the Thibault Claim.

65. Thus, although only a composite figure is given, it seems that a substantial sum is to be paid over in respect of a claim which largely corresponds to the Thibault Claim: R7.9bn is roughly equivalent to £380m. That said, as Mr Al-Attar for the Company has pointed out, and as is explained in the section 155 proposal, this represents a proportionally lower recovery rate (18.7% of the collective claim amounts) than in respect of other contractual claims (where the rate is 29.3%).

66. Before moving on, I should flag one other part of the background relied on by Conservatorium.

67. As noted, the Second Term Sheet was circulated on 9 October 2020. As part of their challenge, Conservatorium drew attention to an email sent to Linklaters LLP two days earlier by Mr Tinus Slabber, who was instructed "*on behalf of Dr Christo Wiese and*

the Titan Group of Companies (which includes Thibault)". I should add that the email was copied to various other recipients, including Conservatorium's advisers, Quinn Emanuel. Mr Slabber referred to ongoing negotiations with a number of parties, and then said that although his clients had been *"prepared to accept benefits substantially less than that which will accrue in the event of a breakup/liquidation in an endeavour to effect a global settlement*", other parties had not been cooperative and so his clients now intended to "*pursue their claims to the best outcome.*" He then went on, however, to add the following:

> *"Notwithstanding and as a courtesy, Steinhoff is afforded until the 30th November 2020 (on condition of payment of an additional Euro 20m) to effect binding written settlements which will allow a global Steinhoff settlement to be implemented and these settlements must specifically include all matters involving Conservatorium, Thibault, Titan and Upington and the Wiese family and entities and will compel payment to my clients (whether in a s. 155 or otherwise) free of contesting, withholding and/or deduction. Failing same, my clients will not pursue the current proposal and will insist on their pro rata share in respect of all claims (it being accepted that SIHPL and NV will end up in liquidation, having to pay a pro rata distribution to concurrent creditors)."*

68. Conservatorium say the demand made by Mr Slabber ("*these settlements must … compel payment to my clients … free of contesting, withholding and/or deduction"*) must be connected to the revised proposal in the Second Term Sheet concerning the Thibault Claim. In fact, they say, the revised proposal must be the Company giving in to Mr Slabber's demand, backed by his clients' threat that if their demand was not met they would not support the Steinhoff Global Settlement and would look to liquidation as an alternative. Thus, they say, the revised proposal is not based on any principled assessment of the relative merits of Conservatorium's claim to ownership versus Thibault's claim to ownership, but instead represents the Company responding in an unprincipled and cynical way to posturing by one of its major creditors.

Scheme Meetings

69. Coming back now to the present Scheme, I should say I have reviewed the Chairperson's report of the Scheme Meetings prepared by Mr James Douglas, a partner at Linklaters LLP. The meetings were held remotely, in accordance with the directions given by Sir Alastair Norris.

70. The short point is that the Scheme was unanimously approved by the Facility A1 Lenders and was approved by a majority in number of the Facility A2 Lenders representing over 92% in value of those present and voting. I am told that the two Facility A2 Lenders that voted against the Scheme (namely CSCP III Master Lux S.a.r.l. and CCP Credit Master Lux S.a.r.l.) are funds affiliated with Conservatorium.

71. As to turnout, 97% by value of the Facility A1 Lenders and 93% by value of the Facility A2 Lenders participated in the vote. All voted by proxy.

The Application for Sanction & the Objection

72. The relevant statutory provision is Companies Act 2006 section 899:

> *"(1) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (…) present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.*
>
> *(2) An application under this section may be made by - (a) the company …*
>
> *(3) A compromise or arrangement sanctioned by the court is binding on – (a) all creditors or the class of creditors or on the members or a class of members..., and (b) the company."*

73. Both the Company and Conservatorium in their respective Skeleton Arguments referred me to the following passage in Re Telewest Communications (No. 2) Ltd [2005] 1 BCLC 772, in which David Richards J stated the relevant principles (at [20]-[22]):

> *"The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Ltd [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:*
>
> > *'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.*
> >
> > *The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.'*
>
> *This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under*

> *s 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.*
>
> *The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'."*

74. The Company says that the Scheme should be sanctioned. Looking to the formulation above derived from Buckley on the Companies Acts, it says that the statutory requirements have all been complied with; that the relevant classes were duly represented and that the relevant majorities acted *bona fide* in the interests of their classes; and that the Scheme is such as an intelligent and honest man might reasonably approve – i.e., the Scheme is "*fair*".

75. Conservatorium, however, says there is a "*blot in the Scheme*." Accepting that it is not a Scheme Creditor, it nonetheless relies on Re BAT Industries (3 September 1998, unreported), a decision of Neuberger J. (as he then was), to say that it has a sufficient interest to give it standing to object. That is because the present Scheme is simply part of an overall effort to give effect to the Steinhoff Global Settlement, and its rights will be affected by that settlement. Moreover, it says its rights in relation to the Thibault Claim will be affected unfairly, since the current proposal is that Thibault will be treated as the owner of the Thibault Claim, whereas the question of ownership is in issue. It is unfair for the Company to have arrogated to itself the power to determine that question. A fair proposal, as the Company itself recognised originally, would be some structure which maintained the *status quo*, but the Company has abandoned that original stance not on any principled basis but in a cynical way designed to prefer the interests of Dr Wiese and his associates. Moreover, the Company has not given a clear account of all its exchanges with the Wiese interests, which would allow its *bona fides* to be properly tested. The Scheme should therefore not be sanctioned, and it is no answer to say that the Steinhoff Global Settlement will be subject to further review by the Dutch and South African Courts, since it is not clear what form those reviews will take and that they will provide sufficient protection for Conservatorium.

Discussion and Conclusions

Statutory Requirements and Other Matters

76. To begin with, I should say I am satisfied that the relevant statutory requirements have been complied with.

77. I have already noted above that the required statutory majorities were obtained. I am also satisfied that the meetings were summoned and conducted in accordance with the

Convening Order made by Sir Alastair Norris. I am also satisfied as to class-composition. Sir Alastair in his Judgment approved the Company's proposal that there be two classes of Scheme Creditor, on the basis that Facility A2 is subordinated to Facility A1, but that no further fracturing of those two classes was justified: here I adopt the reasoning of Sir Alastair at paragraphs [15]-[19] of his Judgment.

78. I am also satisfied as to the *bona fides* of the statutory majorities: the turnout was high, and the decisions they made seem entirely rational. I have seen nothing to suggest that the majorities were not acting in the interests of their respective classes.

79. I will come on below to address the third aspect of the analysis derived from Buckley (the perspective of the intelligent and honest scheme member), since that seems to me to be related to the question whether there is a "*blot in the scheme*." To deal with two other points at this stage, however, I should first mention the question of jurisdiction. As regards the Company, I am satisfied that although incorporated abroad, it has a sufficient connection with the jurisdiction for it to be wound up as an unregistered company under the Insolvency Act 1986: this conclusion is justified on the basis that the Facility A1 and A2 arrangements are governed by English law and the SEAG CPU is governed by English law: see Re Drax Holdings Ltd [2004] BCC 334, and Re Vietnam Shipbuilding Industry Group [2014] BCC 433, at [9]. As regards EU domiciled Scheme Creditors, I am satisfied, in accordance with the settled practice of assuming that the Recast Judgments Regulation (EU) No. 1215/2012 applies, that jurisdiction is established both under Article 25 (on the basis of the jurisdiction clauses contained in the SEAG CPU and the SEAG Intercreditor Agreement), and under Article 8 (on the basis that 10 Scheme Creditors are domiciled in England & Wales, and can act as anchor defendants in respect of the remainder).

80. The second point is the international effectiveness of the Scheme. The purpose of the Scheme, put shortly, is to confer authority under English law for the amendment of debt instruments which are already governed by English law. The conclusion that such amendments will be regarded as effective in jurisdictions outside England & Wales is consistent with the general approach in private international law, and as regards the Netherlands and South Africa specifically, the conclusion is supported by evidence served by the Company (there are expert opinions on South African law from Mr Michael Fitzgerald QC and Mr Roger Wakefield, and on Dutch law from Dr Dennis Faber). Taking these matters together, I am satisfied that the Scheme will be effective internationally.

Factors in Play

81. Under this heading, it is convenient to consider what seem to me to be a series of inter-related matters, all of which feed into the overall analysis of whether Conservatorium has standing, and whether the present Scheme is a fair one or whether it is tainted by a "*blot"* such that the Court should refuse sanction.

82. Having considered the factors in play in this section, I will then set out my overall conclusions in a separate section below.

The Scheme and the Steinhoff Group Settlement

83. I accept the proposition, advanced by Conservatorium, that the present Scheme must be regarded as connected with the proposed Steinhoff Global Settlement. That seems entirely obvious. As already explained above, the purpose of the Scheme is to permit amendments to be made to certain English law documents, which are necessary in order to allow the Steinhoff Global Settlement to be implemented. Mr du Preez for the Company put the matter as follows in his evidence:

> *"The Scheme … is a vital 'stepping-stone' for the Scheme Company in its efforts to implement the Steinhoff Group Settlement. This is because the Scheme Company requires the consent of its financial creditors to proceed with such efforts. In other words, it is a key gating item, without the achievement of which there is no prospect of implementing the Steinhoff Group Settlement."*

84. I also have little doubt that the present Scheme Creditors will have assessed the appropriateness of the Scheme by reference to that overall objective. I have already mentioned (see [54] above) that at least one material benefit, namely the new security to be provided by the Company in respect of liabilities under the SEAG CPU, will become available only when the settlement overall becomes effective. Moreover, the Scheme Creditors were encouraged to take a holistic view. For example, in its Explanatory Statement circulated pursuant to the Convening Order, the Company said the following, in the context of describing the benefits of the Scheme:

> *"The Scheme Company believes that these factors will in combination operate to the benefit of the Scheme Creditors relative to a situation in which the Steinhoff Group Settlement fails. Specifically, the Scheme Company believes that a successfully completed settlement will bring substantial finality to the significant contingent litigation liabilities and related uncertainty to which the Group is currently subject and will remove the overhang of the legacy events from the Group and its underlying businesses for the benefit of the continuing creditors of the Scheme Company, including the Scheme Creditors."*

85. In other words, in deciding how to vote, the Scheme Creditors were invited to compare the benefits thought to flow from overall implementation of the Steinhoff Group Settlement with the consequences of there being no settlement. As to the latter point, the Company's position, as explained in the evidence of its CEO Mr du Preez, is that the no settlement scenario is likely to lead to liquidation. I will need to return to one point on this issue below, but I will say now that, having considered Mr du Preez's evidence, I am satisfied that that is an appropriate comparator. As the Company has indicated, if settlement is not achieved there is a material risk that adverse judgments may be obtained from the latter part of 2021 onwards, and that given that its debt presently matures at the end of 2021, the Company will not be in a position to satisfy such judgments or to refinance its present indebtedness. Any liquidation proceedings are likely to be very complex and to take years to resolve. Financial experts, Analysis Group, have conducted modelling on the likely outcome of a liquidation scenario, which shows predicted returns to creditors (including the present Scheme Creditors)

which are lower than expected returns if a settlement is achieved. This evidence has not been directly challenged, and it seems to me the Court is entitled to rely on it and to accept the Company's case that liquidation is a suitable comparator scenario.

The Scheme a Stepping Stone only

86. At the same time, however, and while acknowledging that the overall equation for the Scheme Creditors was between an overall settlement on the one hand, or no settlement and liquidation on the other, it seems to me important to acknowledge that achieving the hoped-for overall settlement is not a foregone conclusion, and is certainly not achieved by means of the present Scheme alone.

87. On the contrary, other, and significant steps, will be required in order for the Steinhoff Group Settlement to be successfully implemented. Mr du Preez's descriptions of the Scheme as a "*stepping stone*" and a "*key gating item*" were carefully phrased. The present Scheme is not the culmination of the intended settlement process, but only the beginning of it. It is the key that unlocks the door to allow the remainder of the process to unfold, including the further anticipated court approval processes in South Africa and the Netherlands. Those processes will involve seeking input and approvals from much wider constituencies of interested parties than the present process, including not only other financial creditors aside from the Scheme Creditors, but also the various parties whose disputes are intended to be compromised. The relevant Courts will need to determine whether to approve or not approve the Steinhoff Global Settlement having regard to those wider interests. One cannot be certain how all these further elements in the process will develop.

88. It follows, as it seems to me, that the question to be addressed by the Scheme Creditors was not so much about giving final approval for the Steinhoff Global Settlement, but about whether it was in their interests to allow the remainder of the process a chance to run its course, or whether it was better to stop it in its tracks.

89. This question of future uncertainty, even in the event of approval of the present Scheme by the Scheme Creditors, was addressed in the Judgment of Sir Alastair Norris at [25]. Sir Alastair was concerned with the question whether the future uncertainty, arising in particular from the need for further Court approval processes to be conducted in South Africa and the Netherlands, was such that there was no utility in convening the requested meetings of creditors. Sir Alastair considered that, despite the admitted uncertainty, the meetings should nonetheless continue. He said:

> *"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."*

90. The analogy of putting the pieces of the jigsaw on the table is an interesting and apposite one. It suggests that the better approach, in a case where a threshold or "*gating*" issue arises, will usually be to allow the step to be taken which at least allows an opportunity for the remaining pieces of the puzzle to be assembled, rather than shutting the gate and foreclosing the opportunity entirely.

Further proceedings

91. Before me, there was some debate as to precisely what is intended by the Company as regards further steps in South Africa and the Netherlands. Conservatorium described the Company's position as "*coy*", which seemed to be a reference in particular to the fact that it had made no final decision, as far as the Netherlands is concerned, as between the Suspension of Payments procedure and the WHOA procedure.

92. As I have mentioned, however, matters became much clearer as a result of the Company producing a copy of its draft section 155 proposal, as now submitted to the South African Court. It follows that the South African process has now started. We can assume it will continue. Moreover, again as already noted, the section 155 proposal is consistent with the idea that the Company's preferred method of approach in the Netherlands will be by way of the Suspension of Payments procedure, rather than the WHOA procedure, and indeed Mr Al-Attar told me that that was likely to be the case, although he did not feel able to say that a final decision had been made. Mr Al-Attar's indication is obviously consistent with the Company's apparent opposition to the WHOA procedure initiated by Conservatorium itself. In those circumstances, it seems to me that although there is obviously still uncertainty about the eventual outcomes of the two processes, the Court has a sufficiently clear picture of what the Company now intends should follow.

93. It is also relevant to note one further, and important aspect of the intended further processes. This concerns the ability of Conservatorium to participate in them. On this topic I have evidence from Mr du Preez, in his Second Witness Statement. He says the following at paragraph 50:

> *"(i) in the context of any of the implementation processes chosen by Steinhoff in the Netherlands (the "Dutch Implementation Process"), I understand that:*
>
> *(a) as a non-acknowledged creditor whose alleged rights will be directly impacted by the Dutch Implementation Process, Conservatorium will be entitled to be heard by the Dutch court prior to any decision to confirm the Steinhoff Group Settlement;*
>
> *(b) in particular, in either a Suspension of Payments Procedure … or a … WHOA … procedure Conservatorium will be entitled (as of right) to be heard by the court (as to any issue going to voting entitlements) ahead of any confirmation hearings;*

> *(c) Conservatorium will also be entitled (as of right) to be heard by the court at the confirmation hearing and would be allowed to rase any grounds it wishes with a view to persuading the court not to confirm the plan, unless implementation occurs by way of WHOA proceedings and it has by that stage been determined by the Dutch court that Conservatorium is not entitled to vote on the WHOA Composition Plan …*
>
> *(ii) in the context of the Section 155 process in South Africa, I understand that:*
>
> *(a) as a creditor whose alleged rights will be directly impacted by the proposal, Conservatorium will be entitled to be heard by the South African court prior to any decision to sanction the proposal;*
>
> *(b) Conservatorium may seek to persuade the court that Steinhoff should not be permitted to implement the Steinhoff Group Settlement, on the basis that it is inconsistent with Conservatorium's (alleged) rights or otherwise unfair … ".*

94. That evidence was not directly challenged, although for Conservatorium Mr Smith QC said that the position in relation to the South African section 155 process was unclear, insofar as in South Africa (as in this jurisdiction) there may be a question of standing. In response, Mr Al-Attar, on instructions, indicated that the Company would not take any point on Conservatorium's locus to object to the section 155 scheme as an alleged creditor, although not a Scheme Creditor.

Uncertainty as to Ownership of the Thibault Claim

95. Thus far, I have focused on one element of uncertainty in the overall mix, which is the question of uncertainty of outcome as regards the intended Dutch and South African approval processes. But there is another important element of uncertainty, which is the uncertainty as regards Conservatorium's entitlement to advance the Thibault Claim at all.

96. That entitlement is asserted, but not accepted by Thibault/Titan. Proceedings are pending in which the issue is engaged, but have not yet been resolved. In part the issue of entitlement to the Thibault Claim depends on construing the scope of the security granted pursuant to the 2016 and 2017 Security Agreements, which are governed by English law (do "*Related Rights*" include causes of action for misrepresentation and the like?) Neither side, however, has invited a determination of that question, and in fact Conservatorium's position is very emphatically that the "*pending dispute as to the ownership of the [Thibault] Claim] should <u>not</u> be determined by <u>anyone</u> other than by the Dutch or South African Courts*." In any event, determining the English law question would not provide an answer because there is also the separate question of what rights were transferred under the Dutch law Asset-for-Share Exchange Agreement of October 2016.

97. As matters have developed, this ongoing uncertainty presents a problem for the Company in seeking to achieve an overall settlement of claims against the Steinhoff Group. What is now proposed as a response to this uncertainty, although at an earlier stage the proposal was a different one, is that the Company should proceed on the basis that Thibault/Titan are the correct claimants, not Conservatorium.

No Determination of the Ownership Question

98. Pausing there, I should say that on this point, I disagree with the characterisation in Conservatorium's Skeleton (para. 64) that the effect of the Company's proposal, if implemented, will be to "*determine*" the ownership contest between Thibault and Conservatorium. That is not correct. The Company is offering terms of a compromise. It is not determining anything, in the sense of purporting to make a binding adjudication. Nothing it does is intended to bind Conservatorium. It could not possibly do so. Instead, it has decided that it is content to put forward an offer on the basis that payment to Thibault/Titan will discharge the Thibault Claim. It will either be right or wrong about it, but if it is wrong, Conservatorium's rights – whether its security rights under the 2017 Security Agreements or otherwise – will not have been compromised or affected. The effect will be that the Company will have paid the wrong party, and there will have been no effective discharge of liability.

99. I therefore cannot accept the submission made (for example) at para. 57 of Conservatorium's Skeleton, to the effect that the proposal involves the Company "*purporting to determine a proprietary dispute between Conservatorium and Titan/Thibault*", or that at para. 62, to the effect that the Company is an inappropriate body to determine the ownership question. It would be, but that is not what it is proposing to do. Likewise, I cannot accept the overall summary at para. 49, namely that "*Conservatorium's rights will be directly and materially affected by the Steinhoff Group Settlement Proposal*." That is too emphatic a statement given the current uncertainty. Conservatorium's rights *might* be affected, but for the moment it has not established that it has any.

100. To put it another way, it might well have been appropriate to describe the Steinhoff Global Settlement as unfair if it purported to operate in disregard of established legal rights, but it is not obviously unfair for the Company to put forward a proposal based on a particular assumption as to ownership, which is not binding as between the competing claimants, and which it accepts will not be binding on Conservatorium if it turns out to be wrong.

101. Thus, Conservatorium's complaint is really about the Company's failure to propose terms which maintain the *status quo*, as it did originally, but which it has now resiled from.

102. Again, however, given the uncertainty, I do not see this as infringing Conservatorium's rights. It does not have an established right to require the relevant settlement amounts to be paid into an escrow account. It would if it applied for, and obtained, interim relief, perhaps most appropriately in South Africa, but so far it has not done so, and if it were to make such an application (as Mr Al-Attar pointed out) it would likely have to be accompanied by a cross-undertaking in damages, to make good any losses accruing to other affected parties in the event it turned out the order was wrongly granted.

The Second Term Sheet

103. This uncertainty over ownership of the Thibault Claim forms part of the backdrop to the revised proposal in the Second Term Sheet. But there were other factors in the mix as well, which Mr du Preez in his Second Witness Statement describes as follows:

> *"As I explained at paragraph 128 of my First Witness Statement, having initially proposed that the proceeds of the Thibault Claim be paid into escrow, it became clear to Steinhoff that the Steinhoff Group Settlement would not stand a realistic prospect of success if it were proposed on that basis. Important considerations in this respect are that:*
>
> *i) the Thibault Claim is by far the largest claim in the SIHPL estate, comprising approximately 87% by value of the 'Contractual Claims' asserted against SIHPL (which comprise a separate class for the purposes of the proposed Section 155 compromise);*
>
> *ii) there is no basis therefore on which SIHPL's proposed Section 155 compromise, and therefore the Steinhoff Group Settlement as a whole, can succeed without voting support in respect of the Thibault Claim;*
>
> *iii) as Steinhoff has indicated to Conservatorium several times in correspondence (including by means of Linklaters letter dated 8 June 2020 […]) , although it will ultimately be a matter for the chairperson of the relevant Section 155 meeting, Steinhoff's clear view, for all of the reasons set out above and in correspondence, is that a properly advised chairperson would admit Thibault rather than Conservatorium to vote in respect of the Thibault Claim;*
>
> *(iv) for reasons explained below, Steinhoff (as well as other key creditors of the Scheme Company and SIHPL) have very material doubts as to whether Thibault would vote in favour of a Section 155 compromise that did not provide for the proceeds of the Thibault Claim to be paid to it or its nominee; and*
>
> *v) if Thibault did not vote in favour, SIHPL's proposed Section 155 compromise, and therefore the Steinhoff Group Settlement as a whole, would fail to the detriment of the Scheme Company, SIHPL and their respective creditors and contingent creditors (including the Scheme Creditors and Conservatorium)."*

104. On the question of the relative merits of the competing claims to ownership of the Thibault Claim, Mr du Preez had earlier said the following at para. 91 of his First Witness Statement (emphasis added):

> *"It is important to make clear that Steinhoff's reformulation of the proposal in this respect is wholly consistent with its*

> *understanding of the legal position. Having carefully considered the evidence put forward to date by each of the relevant parties, Steinhoff's assessment of the matter is that there is no credible basis for Conservatorium's contention that the Thibault Claim transferred to Upington pursuant to the Exchange Agreement and that Upington never otherwise became entitled to assert it or any equivalent claim. Steinhoff takes that view, among other things, on the basis of: (i) a plain reading of the Exchange Agreement, which contains no express language purporting to transfer claims in the nature of the Thibault Claim; and (ii) the absence of any evidence to suggest that the Exchange Agreement should for these purposes be read otherwise than in accordance with its plain language."*

105. Conservatorium invite me to characterise the Company's action in reformulating the proposal in the First Term Sheet as the Company cynically caving in, on an unprincipled basis, to the demands of a major creditor.

106. I do not agree with that characterisation of the evidence. Approaching the question broadly, it seems to me more natural to characterise the revised terms as an attempt by the Company to balance a number of competing factors. One is the uncertainty over ownership of the Thibault Claim; another is the importance to the Group of the Steinhoff Group Settlement being achieved; another is the relative importance of the Thibault Claim given its size; another is the urgency which arises from the need to extend the current maturity dates for the Group's indebtedness beyond the end of 2021; and yet another is the Company's own advice, and assessment, of the relative merits of Thibault's claimed entitlement to ownership versus Conservatorium's claimed right. Balancing those factors together, the Company has formed the view that the revised proposal in the Second Term Sheet gives it the best chance of securing approval for the Steinhoff Global Settlement. I do not see that as involving unprincipled favouritism. Rather, it is the acceptance of a hard commercial reality, arrived at after a lengthy period of negotiation in an environment which is no doubt highly demanding, and in which different parties have entirely polarised views as to what outcome they would prefer.

107. Having set out that conclusion, I should deal briefly with two particular points made by Conservatorium. The first is an assertion that the duty of full and frank disclosure (see per Snowden J. in Re Indah Kiat International Finance Co. [2016] BCC 418 at [40]), which the Company accepts it is subject to, extended as far as requiring "*a full and frank account*" of the dealings with "*Dr Wiese, the Wiese entities and their representatives … including copies of relevant communications*." Conservatorium says this is required in particular because of Mr Slabber's email of 7 October (above at [67]), the timing of which gives rise to the inference that in publishing the Second Term Sheet on 9 October, the Company was cynically doing just what Dr Wiese and his associates wanted. Conservatorium say that that point needs to be fully ventilated and investigated, and the Company should have given a full account of it.

108. I do not accept that submission. The duty of full and frank disclosure is a vital one, and is no doubt fact specific as Mr Smith QC pointed out, but I cannot agree that in the present context, it requires a detailed account to be given, together with production of relevant copy documents, of the course of negotiations with one of the affected parties. For one thing, whatever the background, the end point of the Company's deliberations

and negotiations with the Wiese parties is clear: it has made its proposal, which can be assessed on its own terms. For another, Mr du Preez has already set out in his evidence an entirely credible explanation of the Company's motivation, which he candidly accepts involves a calculation of what is mostly likely to result in overall approval of the Steinhoff Global Settlement. It seems to me going much too far in those circumstances to think that the role of the Court is to conduct an interrogation of the precise decision-making processes which led to the formulation of the revised proposal, so as (for example) to assess the weight given to the content of Mr Slabber's email of 7 October. That seems to me an irrelevance for present purposes, and not the function of the Court on an application of this kind.

109. The second point to mention is the reference in Mr du Preez's First Witness Statement to the Company viewing Conservatorium's claim to ownership as having "*no credible basis*." It is said that that cannot be true, in particular in light of the decision of the South African Court to permit Conservatorium to intervene in the proceedings begun by Thibault. That being so, Conservatorium say that the reference to "*no credible basis*" is a smokescreen to disguise the Company's real motivation, which is to prefer the interests of Dr Wiese and his associates.

110. This point prompted some detailed discussion before me as to what the South African Judge decided, in determining that Conservatorium had demonstrated a "*prima facie*" case for intervention. It seems to me, however, that that is something of a sterile debate. I am willing to accept that the South African Judge must be taken to have determined that the issue of ownership was a triable issue, and that on the face of it, that is inconsistent with the idea that there is "*no credible basis*" for Conservatorium's claimed entitlement. But I do not think I can infer from that that Mr du Preez's statement of *the Company's* view is inaccurate. After all, it is entitled to take its own advice and form its own view, and I have seen nothing to suggest that Mr du Preez's evidence is anything other than a truthful account of what that view is.

111. Further and in any event, the key point is perhaps not so much whether the Company's emphatic assessment of the Conservatorium claim is accurate, but instead whether there are features particular to the Thibault Claim which justify a different approach to that taken in relation to the Upington Claim and indeed others where ownership is disputed. Again, I have not been invited by either party to express a final view, and must be careful not to do so given the pending proceedings elsewhere, but it seems to me there are some points of distinction which rationally might justify a different approach.

112. As to this, unlike the shares subject to the Upington Claim which were acquired directly, the shares said to be the subject of the Thibault Claim had a more complicated history (see above at [26]-[29]). This makes it difficult to identify the precise number of shares, within the 750m eventually designated as Charged Shares by Upington, which can be traced back to the original acquisition by Thibault in 2014. Conservatorium says this does not matter, because Thibault and Titan accept that at least *some* shares can be traced back, and that is a factual matter which can be resolved in due course. To be fair to the Company, however, I think its point goes further than that, and is not just about identifying a precise number of shares. It also says that, given the difficulties inherent in tracing through a series of larger, fungible holdings the precise shares derived from an original acquisition made some years before, it is unlikely it was intended to grant a security interest over causes of action which accrued on that acquisition, or indeed to transfer them via the Dutch law Asset-for-Share Exchange Agreement. Again, I offer

no comment on these arguments beyond saying that they appear to me to be a rational point of distinction between the Thibault Claim and the Upington Claim, which might be said to justify a different settlement approach.

Conclusions

113. Against the background of those various factors, I come to set out my conclusions.

Standing

114. I should first address the issue of Conservatorium's standing to advance an objection to the Scheme. The Company asserted that Conservatorium had no standing, since it is not a Scheme Creditor, is not affected by the Scheme, and will have the opportunity in other fora (i.e., in South Africa or the Netherlands) to make its objection – and indeed those other fora (borrowing the language of *forum non conveniens*) are clearly and obviously more appropriate fora for the ventilation of its concerns.

115. The authorities establish, however, that the discretion of the Court to take into account the interests of third party objectors is a wide one, and has to be exercised in a commercially realistic manner – i.e., taking into account the broader context in which the Scheme is intended to operate.

116. Both parties referred me to In re BAT Industries plc (unreported, 3 September 1998), a decision of Neuberger J. The scheme there was a members' scheme of arrangement, involving a proposed reorganisation of the ownership of BAT Industries. Separate from the scheme, but still part of the same overall arrangement if the scheme became effective, BAT Industries proposed to declare a dividend *in specie* of certain of its investments. At the sanction hearing, objectors who were pursuing litigation claims against BAT industries in the United States sought to say that they would be prejudiced by the declaration of such a dividend, which was likely to have an impact on their ability to enforce their claims if eventually made out.

117. Neuberger J considered that the objectors had standing before him, but still sanctioned the scheme. On the issue of standing, he said the following, emphasising the broad discretion the Court has:

> *"There is nothing in s.425(2) which indicates that the power of the court is to be fettered as to whom it can hear and what it must take into account. Given that the circumstances in which a company and its members may wish to come up with a scheme are multifarious, it seems to me scarcely surprising that the legislature did not consider it appropriate to lay down any limitations as to the procedure which the court should adopt or the factors it should take into account, when considering whether to sanction a scheme"*

118. Neuberger J also considered the closely related issue that the objection made was not to the scheme as such, but instead to the dividend in specie which was intended to follow. His approach was that the Court should be realistic (emphasis added in the text below):

> *"To my mind the fact that the objectors object to a consequence of the scheme does not prevent them from being heard and does not, at any rate without more, prevent them from having their interests taken into account. First, it appears to me that in light of the way in which s.425(2) is framed, and indeed as discussed in the passage which I have cited from Buckley, there is no reason why the court should be required take such a blinkered, narrow and uncommercial approach as to ignore the fact that the scheme which is sought to be sanctioned is the first and necessary stage of a larger process…*
>
> *However, if it is permissible in an appropriate case to take into account third party concerns when considering whether to sanction a scheme, it seems to me unduly artificial if one can take them into account if they are affected by the scheme itself but not if they are affected by a subsequent step which is clearly dependent on, and consequent on, the sanctioning and implementation of, the scheme.*
>
> *…when a court is asked to sanction the scheme, it is right, as in this case, for the court to be told, and to take into account, the whole context of the scheme including the process of which the scheme forms part. That must be right: the court can scarcely be expected to sanction the scheme unless it appreciates its full commercial and factual context. If that is correct then it seems to me to follow that one can take into account subsequent steps also for the purpose of considering third party objections. Accordingly, it does appear to me that, as a matter of principle, the court can take into account the concerns of the objectors even though they are not the company, or members of the company, and one can take them into account even though their concerns arise not from the scheme itself but from a step which will inevitably follow if and when the scheme is implemented."*

119. Applying that approach here, I have reached the conclusion that Conservatorium should be allowed standing, by which I mean it should be afforded the ability to state its objections and have them taken into account by the Court in its overall assessment of whether to sanction the Scheme.

120. I reach that conclusion on the basis that although it is a third party, and not a Scheme Creditor, Conservatorium has a sufficient interest in the wider restructuring of which the present Scheme forms part to justify its views at least being heard and taken into account. The present Scheme cannot be viewed in isolation; it would be uncommercial and artificial to do so. A fair assessment requires one also to look ahead to the intended Steinhoff Global Settlement. Conservatorium has an interest in the Steinhoff Global Settlement because it has at least the *potential* to affect its rights (i.e. if the assumption the Company and SIHPL intend to make, namely that Conservatorium is not the true owner of the Thibault Claim, turns out to be wrong).

121. I think that conclusion is consistent with the somewhat protean nature of the word "*blot*", which as Vos J (as he then was) said in Re Halcrow Holdings Limited [2011]

EWHC 2662 at [47] " *... has the benefit of a lengthy history but it has no inherent meaning in this context."* I accept Mr Smith QC's submission that the concept of a "blot" enables the Court to take into account, where appropriate, a potentially wide range of factors when considering whether to sanction a scheme, including "*the full commercial and factual context of the scheme, including any consequences of it"*: Palmer's Company Law at 12.070. As Mr Smith also pointed out, there is no statutory guidance on the criteria for judging the fairness of a scheme of arrangement, and "*it is deliberately a broad test to be applied on a case-by-case basis"*: Re T&N Ltd [2005] 2 BCLC 488 per David Richards J at [81].

122. I do not find persuasive the Company's argument based on an analogy with the *forum non conveniens* cases – that is to say, the argument that Conservatorium should be denied standing in this jurisdiction because it will have the opportunity of making its case in either South Africa or the Netherlands.

123. I do not find the *forum non conveniens* analogy an apt one. Where a case is stayed on *forum non conveniens* grounds, the Court declines jurisdiction and the entire matter is referred on to another Court for determination. But there is no question of declining jurisdiction here. For one thing, I was not asked to by the Company: it positively wishes its application for sanction to proceed. For another, as David Richards J pointed out in Re T & N [2005] 2 BCLC 488 at [122], the jurisdiction under the statute is not one which the Court has power to decline:

> *"The English Courts…remain bound by statute to give their own consideration to the fairness of the CVAs or schemes of arrangement, and notwithstanding the strong cross-border element and the desirability of concerted action, have no right or power to cede or qualify that jurisdiction"*

124. It seems to me that if the Court forms the view, as I have, that the objector has raised issues which arguably have a bearing on the question of the fairness of the scheme before it, the Court should consider those issues in determining whether to sanction the scheme or not. It cannot decline to take them into account on the basis that they are better raised elsewhere. If arguably relevant to the fairness analysis, then they should at least be evaluated. The Court cannot decline to deal with one part of the overall inquiry it is bound to undertake.

125. What it can do, however, is to take account of the likely further steps involved in the related restructuring in determining the fairness of the particular scheme before it, at the point in time at which sanction is sought. I will come back to this point below.

126. Before leaving the question of standing, I should indicate that nothing I have said above is intended to cut across the injunction contained in Neuberger J's judgment in BAT Industries, to the effect the court should not be assumed to have some sort of "*roving commission*" in scheme cases at the suit of any objector who claims some sort of prejudice. The broad discretion must be kept in bounds: see also the recent comments of Trower J. in Re Swissport Fuelling Ltd [2020] EWHC 3414 (Ch), at [34]-[46]. My conclusion is only that, on the particular facts of this case, it is right as a matter of discretion to afford Conservatorium standing and to take account of its objection in determining whether to sanction the present Scheme.

Fairness/Blot in the Scheme

127. In my judgment the Scheme is a fair one and there is no "*blot in the scheme*" which should prevent an order sanctioning it.

128. Taking first the perspective of the "*intelligent and honest man, a member of the class concerned and acting in respect of his interest*", I am entirely satisfied that the Scheme is a fair one when viewed through that lens.

129. The Scheme has the limited effect of authorising amendments to certain finance documents, but forming part of the much larger, anticipated restructuring comprised in the Steinhoff Global Settlement. The outcome of that overall process is uncertain, but what *is* certain is that it cannot happen without the relevant amendments coming into effect.

130. The contractual consent process having failed (narrowly) to secure the requisite majorities, the Scheme is proposed as the only effective alternative method of allowing the overall process to continue.

131. From the perspective of the two classes of Scheme Creditor, it is plainly desirable that it should.

132. Approval of the Scheme at least allows efforts to be made to bring the Steinhoff Global Settlement to fruition, with the benefits to the Scheme Creditors which will accrue if that is to happen, including not only the certainty which will flow from a cessation of the litigation hostilities affecting the Group, but also such matters as the grant of new security by the Company in respect of liabilities under the SEAG CPU (see above at [55]).

133. If the Scheme is not approved, however, then the efforts to achieve the Steinhoff Global Settlement cannot proceed and the opportunity to bring it to fruition will be lost. The alternative presented is continuing uncertainty and the likely liquidation of the Group.

134. I should say on this point that Mr Smith QC for Conservatorium challenged the proposition that the alternative to approval of the present Scheme was insolvency. He suggested that in the real world that would not happen, and that more realistically there would have to be a renegotiation.

135. I do not think I should proceed on that basis. Mr Smith's proposition is not supported by the evidence. The evidence is that there has already been a concerted effort at negotiation with multiple parties over a lengthy period, and that patience is beginning to run out (see, for example, Mr Slabber's email at [67] above). In any event I did not understand Mr Smith's submission to be made on the basis of any evidence, but rather based on general experience of how complex commercial negotiations tend to be conducted. It is no doubt correct that such negotiations involve a degree of brinksmanship. I do not however think it right for me to formulate an assessment of the possible counterfactual to approval of the Scheme based on a general feeling about how commercial negotiations are sometimes (or perhaps even often) conducted. That seems to me to be straying into just the sort of commercial evaluation which the Courts should shy away from. I refer again to the indication given by David Richards J., at the end of the passage quoted above from In Re Telewest Communications (No. 2) Ltd

[2005] 1 BCLC 772: " *…in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting*'."

136. I turn then to the question whether there is a "*blot in the scheme*" such that it should not be sanctioned. I think not.

137. In summary, my reason is that as matters stand before me, the asserted unfairness is too remote and inchoate to operate as a basis for my declining to sanction the present Scheme.

138. I have already rejected above (see at [98]-[102]) Conservatorium's submission that the current iteration of the Steinhoff Global Settlement involves the Company making any determination of Conservatorium's rights. That is incorrect in my view. Instead, the current proposal is a response to an ongoing state of uncertainty as to the existence of those rights, and represents (see at [106]) an attempt to balance that uncertainty with a range of other factors relevant to the Group's position.

139. In any event, more critical is the fact that there is uncertainty also as to whether the Steinhoff Group Settlement will come into effect in its current form. It may do – Sir Alastair Norris thought it at least not fanciful to assume it would – but that is not a foregone conclusion, and importantly Conservatorium will be afforded an opportunity to submit that it should not, and should either be abandoned or amended (see above at [93]-[94]).

140. I see no unfairness, and nothing which can properly be described as a "*blot*", which follows from sanctioning the present Scheme in a manner which allows the anticipated further steps in the process to unfold. There is no unfairness because, even acknowledging Conservatorium's interest in arguing for the desirability of an escrow or similar arrangement, the remainder of the process will give it the opportunity to raise that point and to invite the Dutch or South African courts to take it into account. Conservatorium will not be foreclosed from taking whatever action it likes. Moreover, the approval processes to be pursued in the Dutch and South African Courts will allow for a better overall assessment to be made than is possible in this Court. That is because evaluating Conservatorium's position reliably will require it to be considered in light of the Steinhoff Global Settlement as a whole, and that analysis, in turn, is likely to be greatly assisted by an understanding of the positions of the other stakeholders affected by it – i.e., the other financial creditors beyond the present Scheme Creditors, and the other litigation claimants – none of whom are before the Court in this jurisdiction given the limited scope of the amendments sought to be brought into effect by means of the present Scheme.

141. I should again emphasise that in stating my conclusion in that way, I am not purporting to exercise some discretion analogous to the *forum non conveniens* discretion. It is not a question of declining jurisdiction in favour of some other Court which is thought more appropriate to decide the question which arises. Rather, it is a question of assessing the issue of "*blot*" or fairness in a realistic way, which takes account of the fact that the present Scheme is only a limited part of a much broader overall picture, key aspects of which are yet to unfold. Conservatorium in its submissions emphasised the interconnectedness of the present Scheme with the Steinhoff Global Settlement, but I think then attached too little weight, in its argument on fairness, to the opportunities

afforded by that wider process to try to make good its objection. There is little doubt that Conservatorium is well resourced and it has shown no lack of creativity in the steps it has taken so far to try and protect its position; it seems entirely reasonable to suppose that it will seek to avail itself of the opportunities which the ongoing process will create. Given the nature of its objection, no unfairness arises from saying that that is what it should do.

142. The alternative, of course, would be for this Court to decline to sanction the present Scheme. But I fear such a crude response *would* have the potential for unfairness, because it would effectively foreclose any further efforts to implement the Steinhoff Global Settlement, and that might be unfair to the other stakeholders in the process (already mentioned above) who are not involved in the present application. Much better, it seems to me, to follow the guidance of Zacaroli J in Re New Look Financing plc, [2020] EWHC 2793 (Ch), and of Sir Alastair Norris in Re PizzaExpress Financing 2 plc [2020] EWHC 2873 (Ch), and to put this particular piece of the jigsaw puzzle on the table. Time will tell whether it is possible to slot all the remaining pieces together.

Overall Conclusion

143. In summary, I propose to sanction the Scheme. I will need to hear separately from counsel in relation to the proposed form of Order.