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Case No: CR-2019-004856

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

The Rolls Building
7 Rolls Buildings
London
EC4A 1NL

Tuesday 10th September 2019

Before:

MRS. JUSTICE FALK

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Between:

IN THE MATTER OF SYNCREON GROUP BV

IN THE MATTER OF SYNCREON AUTOMOTIVE (UK) LTD

AND IN THE MATTER OF THE COMPANIES ACT 2006

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MR. MARK ARNOLD QC and **MR. ADAM GOODISON** (instructed by **Weil, Gotshal & Manges LLP**) appeared on behalf of the **Applicants.**

MR. DAVID ALLISON QC (instructed by **Jones Day**) appeared on behalf of the **Ad Hoc Group.**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MRS. JUSTICE FALK:

1. This is the hearing of an application made under section 899 of the Companies Act 2006 for an order for the sanction of schemes of arrangement proposed by two companies, Syncreon Group BV and Syncreon Automotive UK Limited. I will refer to them as Syncreon Group and Syncreon UK respectively.

2. There was a previous hearing before me on 25th July, in respect of which I gave a reserved judgment on 31st July. The order I made on that occasion was a convening order, convening meetings of creditors of both companies. Since that order was made, those meetings have been held and the results are that the proposed schemes were overwhelmingly approved by scheme creditors attending and voting by proxy.

3. In respect of one of the classes, the so-called PCF lenders, 100% of those attending voted in favour, representing over 99% of the total principal outstanding.

4. In relation to the second class, Noteholders, of those present and voting, 97.73% by value voted in favour, with one holder representing 2.27% by value voting against. Those voting represented, again, over 99% of the total principal outstanding. No one has come to court to object to the proposed sanction of the scheme or, as I understand it, has sent any communication indicating that they wish to object.

5. As I explained in my previous decision, Syncreon Group is a Dutch incorporated company and Syncreon UK is a company incorporated in England and Wales. They are part of a group that carries on the business of specialised contract logistics in the automotive and technology industry (the "Group"). The Group considers that it is significantly overleveraged and is unlikely to be able to continue in business without restructuring its debt, and that the likely alternatives to the schemes being proposed are enforcement action leading to an accelerated sale or piecemeal insolvency procedures. The schemes form a key part of the proposed restructuring, and indeed the evidence is that no viable alternative short of enforcement action or piecemeal insolvency procedures has been found.

6. The schemes relate to debts owed under a Parent Credit Facility ("PCF"), and Notes owed under a Notes Indenture. I gave some details of these in the previous judgment. There have been defaults in respect of both. Syncreon Group is the principal borrower and is the Note issuer, and Syncreon UK is one of the guarantors of both the PCF and the Notes. An important difference between the two sets of creditors is that the PCF debt is secured. The principal amount outstanding pursuant to the PCF is a little over US$680 million, comprising amounts due under two types of term loan and a revolving credit facility.

7. Notes were originally issued in the amount of $225 million, but following a cancellation of some Notes there is now $220 million of Notes outstanding. The Notes are held in global registered form by DTC and, as is conventional in these cases, references to Noteholders are to persons with beneficial interests in the Notes through the DTC system.

8. The overall aim of the restructuring is to deleverage the Group, improve its liquidity, allow customers to be serviced and suppliers to continue to be paid and, as indicated, to avoid the alternatives of security enforcement or insolvency procedures, and indeed,

also to facilitate new funding. As explained in my previous judgment, those alternatives of enforcement or insolvency are expected to produce significantly lower returns for both the Noteholders and PCF lenders than the returns anticipated pursuant to the schemes.

9. Under the schemes, in broad terms, the existing PCF debt and Notes are released, and it is proposed that the creditors will receive in exchange equity instruments issued by a new Dutch parent company, Newco, and in addition, in the case of the PCF debt, restated debt of Syncreon Group of $225 million. I gave details of the proposed consideration in my previous decision.

10. The terms of the schemes which I am asked to sanction today authorise the entry into of key documents. These include in particular a Restructuring Implementation Deed, which amongst other things sets out the planned steps of the restructuring and their intended timing, and a Deed of Release, which as the name suggests provides for the release of the existing debt and guarantees, and also for certain other releases, including releases in relation to persons involved in the restructuring.

11. I have been taken through minor changes that have been made since the date of my earlier decision, and I am satisfied that there is nothing material to comment on. One point I will make, for clarification, relates to the so-called "backstop" arrangements for the proposed new money lending. I explained in my earlier decision that certain of the PCF lenders had agreed to provide, and had "backstopped" (effectively, underwritten) new money that is to be provided under the restructuring arrangements. Other PCF lenders, who were not originally part of that group, were given the opportunity to participate in that new lending. The total amount of new lending, which includes a restructuring of an existing liquidity facility, is $125.5 million. Of that, $100.5 million was available to so-called non-participating lenders to participate in. I understand that elections were made by holders of 77.5% of the PCF debt to participate, and as a result just under $78 million of that debt will be advanced by those lenders.

12. Turning to the tests for sanctioning a scheme of arrangement, these are well established and may be summarised as (a) whether the provisions of Part 26 of the Companies Act 2006 have been complied with; (b) whether each class of creditors was fairly represented; (c) the fairness requirement, usually expressed as whether the scheme is an arrangement that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve, and (d) whether there is a blot on the scheme. In addition, it is necessary, of course, to consider whether the court has jurisdiction that it should exercise in the circumstances, and whether it is the case that the schemes will have or are expected to have real effectiveness in relevant or key jurisdictions. In this case those key jurisdictions include the United States, Canada and the Netherlands, as well as the UK.

13. Dealing first with compliance with the provisions of Part 26, I am satisfied that the requisite statutory majorities were obtained in respect of each class. The statutory majorities were exceeded by a substantial margin in both number and value terms. I am also satisfied, subject to one minor point, that there has been compliance with the terms of my convening order. The one point to note on that is that my earlier order contemplated that the Explanatory Statement would be uploaded to the relevant website. In fact, due to confidentiality concerns, the link to it on the website generated an e-mail to the information agent by which a scheme creditor could request a copy

upon providing proof of holding. I am satisfied that that requirement, if it was a requirement in the convening order, should be waived. I understand that no one in fact requested a copy in that way, but that may well be because copies were also made available both on the data site for the PCF lenders and through DTC's usual information systems under which it informs Noteholders of relevant matters in relation to the Notes they hold.

14. I am also satisfied that the Explanatory Statement fully set out all relevant matters that might be regarded as material to the scheme creditors' decision whether to approve the schemes, as required by section 897 of the Companies Act.

15. I also need to be satisfied that the classes in respect of the schemes were properly constituted. However, this was fully dealt with at the previous hearing, and there is no material change to consider. No complaint has been made about the composition of the classes and, in the circumstances, it is not appropriate to reopen the matter: see, for example, *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480, at 513.

16. Turning to the question whether the classes of creditors were fairly represented, this is essentially a question as to whether the majority who voted in favour of the schemes were acting bona fide, rather than taking action which coerced any minority. As already indicated, turnout at the scheme meetings was extremely high, and the outcome of the votes does not suggest any oppression of a minority.

17. At the previous hearing and in my ruling, there was quite a lot of discussion about certain aspects that might be regarded as relevant to determining whether the classes were fairly represented. In particular, additional amounts of Newco equity that lenders under the liquidity facility would be entitled to, so-called lockup payments to which those who signed up to a Restructuring Support Agreement ("RSA") would become entitled, and amounts to which the backstop lenders would become entitled.

18. A key point, though, in determining whether the classes of creditors were fairly represented, is to determine whether any scheme creditors had a special interest that was adverse to the interests of others who did not benefit from the same interest. This was discussed relatively recently by Hildyard J in *Re Apcoa Parking Holdings* GmbH [2015] 2 BCLC 659 and again in *Re Lehman Brothers International* [2019] BCC 115.

19. In particular, in *Lehman* at paragraph 89, Hildyard J explained that the concern is whether relevant creditors have a special interest which is adverse to, or clashes with, the interests of the class as a whole, and that a special interest which merely provides an additional reason for supporting a scheme does not undermine the representative nature of the vote. So the question is whether there is an adverse interest which drives the creditors' voting decision.

20. I am satisfied that there is no such adverse interest in this case. So, for example, the right of certain PCF lenders to receive the backstop payment is a price for agreeing to underwrite the new lending. Similarly, in relation to the liquidity facility, the additional amount lenders receive is a price for agreeing to amend it and to forbear enforcement. The lockup payments under the RSA were available to all PCF lenders and Noteholders. The evidence indicates that two PCF lenders and one Noteholder who had not signed up to the RSA and therefore would not qualify for lockup payments nevertheless voted in favour of the schemes. Clearly the Noteholder that opposed the

schemes did not lock up, but it has also not signified any opposition to the lockup payments.

21. In relation to the cross holdings between Noteholders and PCF lenders, the evidence indicates that the requisite statutory majorities would still have been achieved even if those Noteholders who were PCF lenders were excluded from voting as Noteholders, but in any event the existence of cross holdings does not itself indicate an adverse interest.

22. The most important point, however, is that none of these additional amounts, for example available under the lockup or to backstop lenders, represent adverse interests, in the sense of indicating that they would cause those creditors to support the restructuring in circumstances where they would not but for those incentives. The figures indicate that all Noteholders and PCF lenders will be materially better off if these schemes are implemented, as compared to the position if they are not.

23. Turning to the question whether the schemes are an arrangement that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve, as already indicated, the schemes propose to address the overleveraging of the scheme companies and outstanding defaults. Absent the schemes, the returns likely to be available are expected to lead to a significantly worse outcome.

24. The schemes themselves provide for a compromise and release of the PCF debt and the Notes, the related guarantees and relative rights of recourse, and for the exchange of those debts for the scheme consideration, described in my previous judgment. The schemes also authorise the relevant parties to enter into documents to give effect to the restructuring, in particular, the Restructuring Implementation Deed and Deed of Release.

25. I should mention that the proposed Deed of Release not only releases the scheme companies, but also releases co-debtors and co-guarantors, and releases claims against those involved in the preparation, negotiation and implementation of the schemes. The rationale of this is to ensure that claims against third parties are released where such releases are regarded as necessary in order to give effect to the arrangements between scheme companies and scheme creditors, in particular, by avoiding so-called "ricochet" claims which might otherwise undermine the arrangements.

26. The scheme companies have confirmed that they do consider it necessary to include these releases of third parties in order to give full effect to the schemes. I accept that although the releases are relatively wide, they are a relatively regular feature of the schemes and, for example, were discussed in *Re Noble Group* [2018] EWHC 3092 at [23] to [29]. The release provisions were also explained to scheme creditors in some detail in the Explanatory Statement, and a draft Deed of Release was included as an appendix to the scheme document.

27. Overall, I am satisfied that the schemes are such that an intelligent and honest man, being a member of the relevant class and acting in respect of his interest, might reasonably approve them, and therefore that the fairness requirement is satisfied. I am also satisfied that there is no blot on the schemes; no issue has been identified that might be regarded as a blot.

28. Turning to questions of jurisdiction, again, this was considered to some extent in my previous decision. Obviously, Syncreon UK is subject to the jurisdiction. In respect of Syncreon Group, as previously explained, it relies on changes made in July 2019 to the governing law and also to the jurisdiction clauses in the Notes and the PCF debt, under which the documents became governed by English law and there was submission to the jurisdiction of the English courts.

29. I am satisfied that the change to English law provides a sufficient connection with the jurisdiction, and therefore that in principle the court should exercise its jurisdiction, subject to the points that follow. I also note in that context that the Syncreon Group scheme is inter-conditional with the scheme for Syncreon UK, which clearly has a close connection with the UK. I further note that by entering into the RSA over 95% of both classes have submitted to the jurisdiction, because that agreement contains a specific submission to the English jurisdiction by those parties. Furthermore, it is worth noting that, as already indicated, use of the English jurisdiction and the scheme process is regarded as the only viable route for restructuring the scheme companies on a going concern basis.

30. However, the position of scheme creditors needs to be considered, and in particular the potential impact of Council Regulation EU 2015/2012 (the "Recast Judgments Regulation"), because some of the creditors are identified as being domiciled in two EU Member States, Luxembourg and Denmark, although most PCF lenders and Noteholders are understood to be based in the Cayman Islands or the US. The position in relation to the Recast Judgments Regulation has been considered on a number of occasions, most recently by Norris J in *NN2 Newco Limited* [2019] EWHC 1917 (Ch). I am not going to repeat here what he said. In summary, the relatively established position is that the Insolvency Regulation (Council Regulation EU 2015/848) is regarded as not applying to schemes. There is however an open question about whether the Recast Judgments Regulation does apply, and the court conventionally proceeds on the assumption that it may and considers the analysis on that assumption.

31. The starting point is Article 4, under which the general rule is that a person must be sued in the place of their domicile.

32. There are a number of exceptions to this rule. The exception relied on in this case is in Article 25, which provides that where the parties have agreed that a court or courts of a Member State are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or courts are to have jurisdiction, unless the agreement is null and void under the law of the Member State. Article 25 also contemplates that the jurisdiction may be exclusive or non-exclusive.

33. In the case of the PCF debt, there is an asymmetric non-exclusive jurisdiction clause that is very similar to the one considered by Norris J, which he concluded - and I agree with his view - was sufficient to allow the exclusion in Article 25 to be relied on.

34. The position is a little more complex in respect of the Notes, where the submission to the English jurisdiction is, on its express terms, limited to the Note issuers and the guarantors. It provides that the issuers and guarantors "… submit to the exclusive jurisdiction of (i) the courts of England and Wales and (ii) any US Federal or state court … in any suit, action or proceeding arising out of or relating to this Indenture, the Guarantees or the Securities … (it being understood that the party commencing any

such suit, action or proceeding must elect to commence such suit, action or proceeding in one or other of the courts specified above)". The issuers and guarantors also waive any objection to action in those jurisdictions.

35. However, I accept that in substance the position is similar to that considered by Cranston J in the case of *Commerzbank AG v Pauline Shipping Ltd* [2017] EWHC 161, referred to by Norris J at paragraph 41 of his decision in *NN2*. Although on its express terms it is only the issuers and guarantors that submit to the English jurisdiction, that in effect binds Noteholders, or more accurately the Notes trustee on their behalf. Any action that the issuers and guarantors bring would have to be brought in England or in the US, and the Noteholders would have to accept that. Similarly, if the Notes trustee took action in England or the US then there could be no objection to the jurisdiction.

36. I am satisfied that Article 25 should apply, and in the circumstances it is not necessary to consider whether reliance could alternatively be placed on the jurisdiction provisions in the RSA, although I do note that each of the lenders who have identified themselves as being located in Luxembourg or Denmark have in fact signed up to that agreement, and submitted to the jurisdiction on that basis.

37. Turning to the likely utility of the schemes, obviously it is important to determine whether the schemes are likely to have a substantial effect. That was also considered in my previous ruling and nothing has changed in that respect. It is important to note that in the case of the US and Canada, recognition of the schemes is a condition of the restructuring. Those court processes, I am told, have already commenced, with substantive hearings due to take place in relation to the schemes in mid-September.

38. I have before me, as I did at the convening hearing, evidence of foreign law experts in relation to the position in the US, Canada and the Netherlands, to the effect the schemes are likely to be effective and recognised in those jurisdictions. The Dutch law advice is also relied on in relation to other EU jurisdictions in which the Group operates.

39. There are a number of conditions precedent, both to various operative provisions of the scheme becoming effective and to the actual restructuring being implemented. I have mentioned the key ones, which are recognition by the US and Canadian courts. Other conditions, I am informed, have either been fulfilled or are expected to be fulfilled without difficulty, it being anticipated that the restructuring will become effective on 30th September.

40. In all the circumstances, I grant the order to sanction the schemes.

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