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

Royal Courts of Justice
Strand
London
WC2A 2LL

23 September 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

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IN THE MATTER OF:

(1) THOMAS COOK GROUP PLC, (2) THOMAS COOK SERVICES LIMITED, (3) THOMAS COOK GROUP TOUR OPERATIONS LIMITED, (4) THOMAS COOK GROUP AIRLINES LIMITED, (5) THOMAS COOK WEST INVESTMENTS LIMITED, (6) THOMAS COOK FINANCE 2 PLC, (7) TRAVEL AND FINANCIAL SERVICES LIMITED, (8) RETAIL TRAVEL LIMITED, (9) THOMAS COOK UK TRAVEL LIMITED, (10) THOMAS COOK GROUP TREASURY LIMITED, (11) THOMAS COOK AIRLINES TREASURY PLC, (12) THOMAS COOK AIRLINES LIMITED, (13) THOMAS COOK AIRCRAFT ENGINEERING LIMITED, (14) THOMAS COOK IN DESTINATION MANAGEMENT LIMITED, (15) BLUE SEA OVERSEAS INVESTMENTS LIMITED, (16) THOMAS COOK MONEY LIMITED
(17) THOMAS COOK GROUP UK LIMITED, (18) THOMAS COOK TOUR OPERATIONS LIMITED, (19) THOMAS COOK RETAIL LIMITED, (20) THOMAS COOK UK LIMITED, (21) TCCT RETAIL LIMITED, (22) THOMAS COOK INVESTMENTS (2) LIMITED, (23) THOMAS COOK CONTINENTAL HOLDINGS

LIMITED, (24) THE FREEDOM TRAVEL GROUP LIMITED, (25) MY TRAVEL GROUP LIMITED, (26) FUTURE TRAVEL LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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MR TOM SMITH QC and MR RYAN PERKINS (instructed by **Slaughter & May LLP)** appeared for the **Petitioner.**

MR ADAM GOODISON (instructed by **Ashurst LLP**) appeared for the Official Receiver**.**

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Approved Judgment

MR. JUSTICE MARCUS SMITH:

1. I have before me petitions for the winding up of 26 companies. I shall refer to these companies as the "Companies". The Companies are all part of the Thomas Cook Group, which I shall refer to in this ruling as the "Group".

2. The petitions are all presented by the directors of the Companies in the Group. The petitions are for the immediate winding up of the Companies. One of the orders sought is that, if I am minded to grant the petitions, the notice requirements that would ordinarily apply be dispensed with, so that the windings up can take place immediately. If such an order is made, the Official Receiver will, by operation of law, be appointed as liquidator.

3. The Official Receiver, who has unsurprisingly been closely involved in the events preceding these petitions, intends in these circumstances to apply for orders appointing AlixPartners LLP and KPMG LLP as special managers of the Companies. The report of the Official Receiver, which I have seen and read, sets out in paragraphs 12 and 13 precisely which Companies AlixPartners and KPMG will be special managers for. In broad brush terms, AlixPartners will be assuming responsibility for the holidays and repatriation aspects of the Group and KPMG for the retail engineering and main hanger aspects of the Group.

4. It is, however, for the purposes of this ruling, not pointful for me any further to differentiate between the two special managers, nor indeed over the Companies over which they will be appointed as special receivers. I am satisfied that careful thought has been given to the post-liquidation regime and I shall simply refer, in this ruling, to the "special managers", without differentiating between AlixPartners and KPMG.

5. In addition to the directors of the Companies and the Official Receiver, I also have before me the Civil Aviation Authority (the "CAA"). As I shall come to describe, the CAA will play an important role, with the special managers, in ensuring the orderly winding up of the Companies.

6. The circumstances giving rise to the petitions is stated in the evidence of Dr Peter Fankhauser, a director of and the chief executive of Thomas Cook Group plc, whose statement I have read. I have also seen and read the statement of Mr Justin Russell, in respect of other Companies in the Group. They have described in some considerable detail the circumstances that have led to these applications being made. I shall not, in this ruling, go in detail into the circumstances. It is, however, appropriate that I provide a summary of the position, which I draw from the helpful written submissions of Mr Smith, QC, who appears for the petitioners.

7. During the course of the last 12 months, the Group's financial position has deteriorated as a result of challenging trading conditions, including the general economic slow-down, customer uncertainty and a substantial increase in competition in the Group's markets. The Group has unsecured financial

indebtedness of about £1.9 billion. The debt arises under a revolving credit facility and two series of notes. A substantial number of the Companies are principal debtors or guarantors in respect of the revolving credit facility and/or the notes. The Companies have a number of other very substantial liabilities, including liabilities to employees, bonding providers, credit card issuers, pension creditors, the CAA and intercompany liabilities.

8. In addition, the Group is facing an urgent cashflow crisis. This has been exacerbated by the media coverage of the Group's financial difficulties in recent days, which has significantly damaged public confidence in the Group's ability to trade. In recent days, suppliers have demanded pre-payment from the Group for crucial supplies, which has further impaired the Group's liquidity. It is projected that the Group will run out of money by around 4 October 2019, and quite possibly earlier than this date.

9. In order to survive, the Group needs to raise a large amount of new money. The Group has made extensive efforts to secure and infusion of new money. However, despite these efforts, it is now clear that sufficient support from the Companies' stakeholders, in order to achieve a successful outcome for the Group, has not been obtained.

10. A number of the Companies in the Group participate in a Group-wide cash pooling arrangement, which effectively means that their cashflow positions are inextricably intertwined. Although some of the Companies do not participate in the Group's cash pooling arrangement, they are also cashflow insolvent.

11. For a number of months, the Group has pursued a number of options, in an effort to address its financial difficulties. A number of Companies within the Group have sought to promote schemes of arrangement under Part 26 of the Companies Act 2006. The schemes have sought to amend the consent thresholds for implementing a debt for equity swap under the Group's finance documents. The schemes would not, in themselves, have affected any recapitalisation of the Group. Some form of injection of additional capital would have been required in order to enable the schemes to have effect. A convening hearing for the schemes being promoted took place before Norris J on 30 October 2019. At that hearing, Norris J gave permission to convene creditors' meetings in respect of the schemes. These were originally scheduled to take place on 18 September 2019, but that date was delayed (by order of the court) until 27 September 2019, so as to enable to the Group to continue negotiating with its creditors in advance of the meetings. It will be apparent, given that this hearing is now taking place in the early hours of 23 September, that these meetings have not and will not now take place.

12. The reason the schemes have not progressed is that it is clear that there is insufficient support for the restructuring which the schemes would have sought to facilitate. That has been explained to me in detail in the evidence before me, and I need not go into it in the course of this ruling. What is clear is that, based on extensive discussions with the Group's creditors, the directors believe that there is no realistic prospect that a restructuring of the Group can be achieved within the necessary timeframe. The result is that, with great

regret, the directors of the Companies have concluded that the Companies cannot continue to carry on in business.

13. It is important to be aware of the implications of this. Approximately 145,000 of the Group's customers who live in the UK are currently abroad on holiday and will need to be repatriated. That repatriation exercise will be co-ordinated by the CAA, with the assistance of the Official Receiver and the special managers, if appointed by the court. The CAA is represented before me by Reed Smith LLP and has been in close contact with the Companies in recent weeks and months, as indeed has the Official Receiver.

14. Detailed contingency plans have been formulated, and if I make the orders that I am being invited to make, these contingency plans will now be activated. It is fair to say that the directors of the Companies have done their very best to see if some form of arrangement other than liquidation can be pursued. From the final iteration of Dr Fankhauser's statement (I have seen previous versions in draft), it appears that the final decision that there was no alternative to liquidation and that these petitions would have to be advanced was made by the directors late last night or in the very early hours of this morning. (This hearing, I should note, commenced at 1:00am on Monday 23 September 2019.)

15. I shall refer in greater detail to the contingency planning, in particular the repatriation, in the context of the need to appoint special managers. Before I do that, however, it is necessary to consider whether, in the circumstances that I have described, there is any alternative available to the course suggested by the directors, namely compulsory liquidation of the Companies.

16. I am satisfied that there is no such alternative. In theory, the Companies have four options open to them. In practice, three of these options are utterly unviable, and liquidation is the only appropriate course open to the directors and to this court. I shall briefly explain why that is the case:

    i) The first option is for the Companies and the Group to continue trading without any recapitalisation. That approach is not viable and not properly open to the Companies. The Companies are, as I have described, due to run out of money by 4 October 2019 and they cannot continue trading any longer in the absence of recapitalisation, which is not forthcoming. It would be entirely inappropriate for the Companies to incur further liabilities in view of the conclusion that has been reached regarding their financial position. This first option is entirely unviable.

    ii) The second option is to continue attempting to negotiate a recapitalisation. Again, that approach is not viable nor open to the Companies. The Companies have been negotiating for some time, including negotiating the possibility of a rescue by Her Majesty's Government. Those negotiations have failed. There is no deal on the table that is capable of commanding a sufficient level of support to enable the Companies to continue trading.

iii) The third potential option, which is also unviable, is administration. In order for this court to make an administration order, this court must be satisfied that the purpose of administration is reasonably likely to be achieved. There are various purposes that an administration order can be made for: (a) to rescue the company as a going concern; (b) to achieve a better result for the company's creditors as a whole than would be likely if the company went into liquidation; or (c) to realise property in order to make a distribution to one or more secured or preferential creditors. None of these options is reasonably likely to be achieved.

iv) That leaves the fourth, and only viable, option, which is that of compulsory liquidation. A winding up order brings the Companies' businesses to an end and ensures that the assets of the Companies are distributed in an orderly fashion, in accordance with statute. Unlike administration, there is no need for the Companies to identify an insolvency practitioner who is willing to accept appointment as liquidator. The Official Receiver will instead become the liquidator as a matter of law, pursuant to section 136 of the Insolvency Act 1986.

17. It is important, in this regard, to note that Her Majesty's Government has indicated that, whilst it will not fund an administration, it will provide the support necessary for an insolvency process which involves the Official Receiver being appointed as a liquidator. The Official Receiver will consent to act as liquidator on an expedited basis and has arranged, as I have described, for insolvency practitioners at AlixPartners and KPMG to assist by accepting appointment as special managers. There will, consequent upon the orders that I am being invited to make, be a services agreement between the special managers and the CAA, pursuant to which services will be provided to ensure the repatriation of approximately 145,000 people back to the UK who are presently abroad.

18. I will return to the repatriation and other arrangements later on in this ruling, but it is clear to me that the only option before this court is to put the Companies into compulsory liquidation. In these circumstances, it seems to me entirely appropriate that the petitions be granted and winding up orders be made in respect of all the Companies.

19. Mr Smith, QC's, written submissions take me through the jurisdictional requirements. I am entirely satisfied that the jurisdiction to wind up the Companies exists and that it is appropriate, for the reasons that I have given, to exercise that jurisdiction. The only procedural point that I intend to address is the question of dispensing with the notice of requirements that ordinarily apply in these cases.

20. In normal circumstances, a petitioner must give notice of the petition to wind up. However, there is express power given to the court to dispense with this requirement. In this case, it is urged upon me that the notice requirement be dispensed with. The critical reason as to why notice should be dispensed with is that the present situation is one of very real urgency. There is an urgent requirement for office holders to be appointed to the Companies and it is

undesirable in the extreme for there to be some kind of gap between the presentation of petitions to wind up the Companies and the actual winding up of the Companies.

21. There are other, subsidiary, reasons as to why the notice requirement should be waived. Giving notice, in this case, would serve no purpose. This is a petition, as I have noted, by the directors themselves, which the Companies do not oppose. The fact that there are creditors who might support the petition is irrelevant. Were any creditor to oppose these petitions, it is impossible to see what arguable grounds they could advance, absent a desire to put forward funding for the Companies, which as I have explained is not and has not been forthcoming, despite considerable effort. The fact is that the Companies' creditors have had ample opportunity to consider whether or not to provide the requisite amount of financial support to the Companies. They have decided not to do so, and we are where we are.

22. In these circumstances there is no useful purpose to be served by delaying the winding up of the Companies. To the contrary, there is an enormous disbenefit to the many people who will suffer as a result of this unavoidable liquidation. The persons critical to minimising the hardship and inconvenience that will be suffered by these people are the Official Receiver, the special managers and the CAA. It would, therefore, be undesirable in the extreme to delay the making of a winding up order. All that would do is delay the appointment of the Official Receiver.

23. Thus, although it is relatively unusual for a winding up order to be made immediately, in these circumstances that is the proper course. This is the course followed by Morgan J in *Re Carillion plc* and by Snowden J in *Re British Steel Ltd*, where, for different reasons, there was a similar urgency.

24. Accordingly, it is appropriate that I make orders winding up the Companies. I have before me a consolidated form of order to that effect. I have reviewed the draft and I am prepared to make that order. I do so at 1.47am on 23 September 2019.

25. That order having been made, by virtue of section 136 of the Insolvency Act 1986, the Official Receiver becomes the liquidator automatically. The Official Receiver, in turn, seeks to apply to appoint the special managers that I have referred to. Section 177 of the Insolvency Act 1986 permits the court to appoint a special manager in broad terms. Section 177(1) provides that where a company has gone into liquidation, or a provisional liquidator has been appointed, the court may, on an application under this section, appoint any person to be the special manager of the business or property of the company. The court has a wide discretion to appoint a special manager and simply needs to be satisfied that its discretion should be exercised in favour of the appointment.

26. By section 177(2) of the Insolvency Act 1986, it is the liquidator who applies for the appointment of the special manager. Section 177(2) provides:

"The application may be made by the liquidator or provisional liquidator in any case where it appears to him that the nature of the business or property of the company, or the interests of the company's creditors or contributors or members generally, require the appointment of another person to manage the company's business or property."

27. By rule 7.93(1) of the Insolvency (England and Wales) Rules 2016, an application made by the liquidator under section 177 for the appointment of the special manager must be supported by a report setting out the reasons for the application.

28. So, I have a broad discretion which must, however, be exercised in light of the Official Receiver's report inviting me to appoint special managers. I have received and read the report of the Official Receiver, Mr Chapman, who is present in court before me. I am entirely satisfied that the appointment of special managers, as sought by the Official Receiver, is appropriate in these circumstances and I am satisfied that the necessary requirements for their appointment are met.

29. The broad set of work streams that the special managers will undertake in conjunction with the Official Receiver and the CAA are summarised in paragraph 11 of the written submissions that I have received from Mr Goodison of counsel, who speaks for the Official Receiver. Those workstreams are listed as follows:

    i) Liaising of operations staff, both in the airline, hotel and other sectors of the business, including in the UK and abroad;

    ii) Liaising with Her Majesty's Government and the CAA in relation to the repatriation of customers who are currently abroad;

    iii) Taking control of the Group's sites in the UK and abroad;

    iv) Discussions with, and oversight of, the significant number of employees;

    v) Liaising with subcontractors;

    vi) Monitoring and understanding funding requirements; and

    vii) Understanding and exploring the available and appropriate strategy options for the liquidation;

30. I have read, in conjunction with the other material before me, the evidence of Mr Paul Smith, who is the director of the Consumers and Markets Group of the CAA. His statement sets out the very complex repatriation exercise that will now take place in light of the liquidation of the Companies. I am very grateful to Mr Smith for his description of this process. The repatriation exercise is described in paragraphs 12*ff* of Mr. Smith's statement. I will not read out those paragraphs, but they should be incorporated into this ruling by reference.

31. I should finally explain why the orders that I make are being made now. This hearing began at 1:00am in the Royal Courts of Justice and my orders are being made in the early hours of this morning. The reasons for this appear in paragraphs 20 and 21 of the statement of Mr Smith:

> "20. The repatriation exercise will be the largest such exercise which the CAA has ever undertaken. It will involve very close co-ordination between the Official Receiver, the relevant proposed special managers and the CAA and will involve the contingency planning being implemented immediately upon the winding up orders coming into effect. For example, it will be necessary for the CAA and the Official Receiver to issue press releases and communications on social media very shortly after their appointment to advise and reassure consumers and employees of the steps which are being taken for their protection. This is of particular importance given the level of press interest which these matters have already generated and is likely to increase further upon the making of winding up orders. Identifying consumers abroad will require the use of the liquidated companies existing workforce, including cabin crew, all subcontractors both in the UK and abroad, and will necessarily involve access to certain of the liquidated companies' premises and in particular their IT systems. The CAA will need to put into effect this complex contingency planning in order to procure or secure aircraft to repatriate consumers who might otherwise be stranded abroad. The CAA and the proposed special managers will need to contact the foreign hotels at which the consumers are staying to seek to ensure that the consumers' accommodation for the remainder of that holiday is assured. It is estimated that consumers are staying at around 3000 foreign hotels.
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> 21. It is highly desirable that if the court makes the winding up orders sought, these take effect in the early hours of the morning at or about 2:00am, when at least a large majority of the fleet of planes of Thomas Cook Airlines Ltd will be stationary and so the CAA, the Official Receiver and the proposed special managers can begin to give effect to the exercise within hours thereafter, before flights commence later in the morning. If the winding up orders sought are made at or about 2:00am, it is likely that the six planes of Thomas Cook Airlines Ltd will be in flight. However, following consultation with representatives from the CAA Safety and Airspace Regulation Group and the accountable managers of Thomas Cook Airlines Ltd, the Official Receiver has agreed that while these flights can proceed to their planned destination, no further flights operated by Thomas Cook Ltd will be authorised to depart."

32. For the reasons I have given it is entirely appropriate that I make an order appointing the special managers. I have before me a consolidated order which I make. I time it, if it is necessary to time it, at 1.56am.

33. It remains for me to say that the winding up of the Companies is of course highly regrettable. It is, however, pleasing in these circumstances to record the very considerable efforts that are being undertaken to ensure that the adverse effects of the orders that I have made are being mitigated by the Official Receiver, the special managers and the CAA in the manner that I have described. I am very grateful to all before me for the efficiency with which this hearing has been organised and I further extend my particular thanks to the court staff for the somewhat unreasonable hour at which we have been sitting.