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Claim Nos: CR-2019-002172
CR-2019-002173

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 2 April 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

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IN THE MATTER OF:

NEW LOOK SECURED ISSUER plc

AND IN THE MATTER OF:

NEW LOOK LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

- -

Mr William Trower, QC and **Ms Charlotte Cooke** (instructed by **Linklaters LLP**) for the **Applicants**

Hearing date: 2 April 2019

- -

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 may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. I have before me applications by New Look Secured Issuer plc (the "Secured Issuer") and New Look Ltd ("NLL") – together the "Scheme Companies" – for orders pursuant to section 896 of the Companies Act 2006 (the "2006 Act") convening meetings of creditors for the purposes of considering and, if thought fit, approving proposed schemes of arrangement in respect of each of the Scheme Companies. I shall refer to the schemes collectives as the "Schemes" and individuals as the "Senior Secured Scheme" and the "Parallel RCF Scheme".

2. The Schemes are complex and the description of them in this ruling draws heavily on the very helpful written submissions provided to me by Mr Trower, QC and Ms Cooke. I am indebted to them.

B. BACKGROUND

(1) The Group

3. The Scheme Companies are subsidiaries of New Look Finance Limited (the "Parent"). The Parent is a wholly owned indirect subsidiary of New Look Retail Group Limited ("NLRGL"). I shall refer to NLRGL, the Parent and the Parent's subsidiaries (including the Scheme Companies) as the "Group".

4. The Group was founded in 1969 and has developed into a leading fast fashion retailer operating in the value segment of the clothing and footwear market. It operates a multichannel model which, as of 22 December 2018, comprised:

   (1) 542 New Look-branded stores, including 536 directly operated stores in the UK and the Republic of Ireland and 6 franchise stores in North Africa and Asia;

   (2) 98 stores across France, Belgium, Poland and China, either closed or to be closed as part of exiting these markets;

   (3) The New Look e-commerce platform serving customers in approximately 66 countries across the world; and

   (4) The third-party e-commerce platform through which the Group sells its products on websites of key third party e-commerce retailers, including ASOS and Zalanda, which currently serves in aggregate over 240 countries.

(2) The Scheme Companies

5. The Secured Issuer is an English public limited company, incorporated on 28 May 2015 for the purposes of refinancing the activities of the Group. It has not engaged in any activities other than the issuance of notes and has no material assets (other than an intercompany receivable owed to it by its parent in respect of the proceeds of those notes).

6. NLL is an English private limited company, incorporated on 5 March 1986. The principal activity of NLL is to act as a holding and head office functions company for the Group. NLL also owns and licenses the Group intellectual property and is now the principal debtor in respect of a revolving credit facility.

(3) The debt structure of the Group

7. The Group's principal debts comprise the notes with which the Senior Secured Scheme is concerned, a revolving credit facility with which the Parallel RCF Scheme is concerned, and some junior notes which are not being compromised by the Schemes. The Group also has operating facilities, a bridge facility entered into during the preparation of the restructuring and certain FX hedging arrangements.

8. In summary the Group's key obligations comprise:

   (1) The "Existing SSNs" issued by the Secured Issuer pursuant to a New York law governed indenture dated 25 June 2015 (the "Existing SSN Indenture") comprising:

      (a) £700,000,000 6.5% fixed rate senior secured notes due 1 July 2022 (the "Fixed Rate Notes"); and

      (b) €415,000,000 4.5% floating rate senior secured notes due 1 July 2022 (the "Floating Rate Notes").

   (2) The "RCF", an English law governed £100,000,000 revolving credit facility agreement dated 25 June 2015 between, amongst others, the Parent, certain lenders (the "RCF Lenders"), Deutsche Bank AG, London Branch as Security Agent and Facility Agent (the "RCF Agent"). By an English law governed accession letter and deed of novation dated 15 March 2019 between NLL and New Look Retailers ("Retailers"), NLL acceded as an additional borrower under the RCF through a transfer of the borrowing obligations of Retailers.

   (3) The "Operating Facilities", comprising £100,000,000 of operating (liquidity, trade and import) facilities, which are utilised to the fullest extent possible, pursuant to:

      (a) A trade finance facilities agreement dated 16 March 2018 between, amongst others, Retailers, the Parent and HSBC Bank Plc as Facility Agent and Issuing Bank.

      (b) A buyer agreement originally dated 10 February 2010 between, amongst others, Retailers and HSBC Invoice Finance (UK) Limited (the "Operating Facility Lender").

   Together, I shall refer to these as the "Operating Facility Agreements".

   (4) The "Bridge Facility", an £80,000,000 bridge facility made available to Retailers as principal debtor in order to address by way of interim funding the liquidity challenges that I describe further below. The interim financing was open to participation by all holders of Existing SSNs (subject to certain eligibility requirements) during a subscription period which commenced on 23 January 2019

and ended on 18 February 2019, providing that the participant (amongst other things):

(a) Acceded to the "Lock-Up Agreement" and agreed to support the "Restructuring". I refer further to both the Lock-Up Agreement and the Restructuring below;

(b) Confirmed its commitment to participate in the Bridge Facility in the appropriate amount; and

(c) Confirmed its commitment to subscribe for its proportionate share of the New Money Bonds as further described below.

On 28 January 2019, the full amount of the Bridge Facility was advanced by the "Backstop Parties". The Backstop Parties comprise: *(i)* Brait Capital International Limited (a significant holder of Existing SSNs)(the "Brait Bondholder"); and *(ii)* the Bondholder Committee (a term defined in the Bridge Facility), there being a syndication to other holders of the Existing SSNs thereafter. At the end of the subscription period, holders of more than 90% of the Existing SSNs had participated in the Bridge Facility. The margin on the Bridge Facility is 12% per annum, and the lenders of the Bridge Facility will also be entitled to receive a fee from the Parent of 5% on all Bridge Facility amounts which are repaid or prepaid. In addition, the Backstop Parties receive a backstop fee in an aggregate amount of 4% of the total issue amount of the "New Money Bonds", which I describe further below. The Bridge Facility has a termination date of 30 June 2019, unless extended to 30 September 2019 with the consent of the Backstop Parties.

(5) The "SNs", £200,000,000 8% senior notes due 1 July 2023 issued by New Look Senior Issuer plc (a wholly owned subsidiary of the Parent)(the "Senior Issuer") under an indenture dated 24 June 2015. £23,281,000 of the SNs have been cancelled, so that as at 24 March 2018, there was £176,719,000 in notional outstanding debt in respect of the SNs.

(6) The "FX Hedging": Retailers is the counterparty to certain foreign exchange forward transactions under a hedging agreement with an international investment bank pursuant to a long-form confirmation dated 23 January 2019.

(7) "Other Group Indebtedness": NLL, Retailers and their subsidiaries owe certain upstream loans to members of the Group. The members of the Group to whom these loans are owed will not form part of the "Restructured Group", a term again considered further below.

9. The creditors of the Secured Issuer in respect of the Existing SSNs and the RCF Lenders are together the "Scheme Creditors".

10. As at 11 March 2019, the Group's total indebtedness as described above, save for the Operating Facilities, FX Hedging and the Other Group Indebtedness, comprised as follows:

	Total Principal Outstanding (as at 11 March 2019)	**Total Accrued Interest (as at 11 March 2019)**
Fixed Rate Notes	£700,000,000	£14,787,500
Floating Rate Notes	€415,000,000	€4,513,125
RCF	£100,000,000	£152,619
Bridge Facility	£72,846,847 €8,114,751	£1,112,071 €95,269
SNs	£176,719,000	£4,594,694
Total	**£1,049,565,847** **€423,114,751**	**£20,646,884** **€4,608,394**

(4) Security

11. Amounts owed by the Group under the Existing SSNs, the RCF, the Operating Facilities, the FX Hedging and the SNs are secured by an English law governed debenture dated 26 June 2015 between a security agent and the Group companies.

12. The rights of the holders of the Existing SSNs, the RCF Lenders and the holders of the SNs and the ranking of the debts and liabilities owed, are regulated by an intercreditor agreement (the "Existing Intercreditor Agreement"), which is governed by English law. The indebtedness ranks in the following order by reference to enforcement proceeds:

    (1) First, the RCF, the Operating Facilities, the Bridge Facility and the FX Hedging (which rank *pari passu* and on a pro rata basis);

    (2) Secondly, the Existing SSNs; and

    (3) Thirdly, the SNs.

13. The RCF Agreement also contains waterfall provisions under the terms of which the RCF ranks ahead of the Bridge Facility.

(5) Financial difficulties

14. The Group has experienced a squeeze on liquidity as a result of a range of internal and external factors. Amongst other things, the fashion retail sector in the UK has faced a decline in footfall on the high street, requiring more costly promotional efforts to stimulate trade. Further, it appears that the Group alienated its core customer base by moving towards a higher priced offering, but it failed to capitalise on key trends. The Group's branch, distribution centre and head office costs have also increased significantly in recent years.

15. On 21 March 2018, a Company Voluntary arrangement ("CVA") took effect between Retailers and its creditors. The purpose of the CVA was to re-base the property portfolio of the Group to market rents, in order to provide a stable platform against which other turnaround initiatives of the Group could be implemented.

16. As at December 2018, 105 stores were closed, in the process of closing or expected to be closed as a result of the approval and coming into effect of the CVA. The CVA also reduced rents across 393 stores, with reductions ranging from 15% to 55%.

17. More recently, as a result of the continued financial pressures facing the Group:

    (1) On 16 January 2019, the Group had to allow its Belgian subsidiary, New Look Belgium SAS, to file for insolvent liquidation in Belgium on 16 January 2019.

    (2) On 15 March 2019, the Secured Issuer was unable to pay its interest coupon payment due under the terms of the Existing SSNs.

    (3) The Group's subsidiary in Poland, New Look Poland SP. Z.O.O. filed for insolvency on 18 March 2019.

    (4) The Group's subsidiary in France, New Look France SAS, filed for judicial reorganisation on or around 19 March 2019.

18. In addition, EBITDA for Financial Year 2019 is now projected to be £75-78m from the Group's core business and a £27m loss from the non-core business, which is worse than initial forecasts.

D. THE NEED FOR A RESTRUCTURING

19. It is the clear view of the directors of the Scheme Companies that the Group's current level of debt is unsustainable. The Restructuring (as defined below), of which the Schemes form part, is therefore intended to provide the Group with a strengthened and deleverage balance sheet, with lower overall gross debt.

20. If the Restructuring is not implemented, the Bridge Facility will terminate on 30 June 2019 and the Group is unlikely to be able to repay it. In the absence of some other workable transaction being proposed to address the Group's difficulties (and its implementation funded), the directors would seek to maximise recoveries for creditors as best they could, but anticipate that the members of the Group would likely be forced to file for appropriate insolvency proceedings.

21. The Scheme Companies have obtained from KPMG an analysis of the likely outcomes for Senior Secured Scheme Creditors in the event that the Group has to enter into liquidation or an accelerated sales process. That analysis indicates that there will be a very substantial shortfall in the recoveries for Senior Secured Scheme Creditors in such circumstances and that those recoveries are likely to be worse than their potential recoveries pursuant to the Senior Secured Scheme. The Scheme Companies' directors also believe that recoveries for RCF Creditors will also be uncertain (notwithstanding their super senior position under the security waterfall) given the challenging market conditions in which the Group currently operates. On any analysis, the KPMG report indicates that there would be no recovery for the holders of the Existing SSNs in such circumstances.

22. The directors of the Scheme Companies therefore consider that the Restructuring (including the Schemes) is in the best interests of the Group's stakeholders, including, in particular, the Scheme Creditors.

E. THE RESTRUCTURING

23. In December 2018, the Group began to engage with certain of its key financial stakeholders in relation to its liquidity issues. In January 2019 it reached an in-principle agreement with the Brait Bondholder and certain other holders of Existing SSNs as to the key terms of a restructuring of the Existing SSNs, pursuant to which the holders of the Existing SSNs would convert their debt claims into reinstated senior secured notes and shares in a new holding company. On 14 January 2019 the Group announced that this in principle agreement had been reached.

24. The Restructuring comprises the following aspects:

    (1) A new holding structure will be established for the group, being a newly incorporated company, "TopCo" (owned by certain holders of the Existing SSNs and the existing shareholders of TopCo Gun BidCo Ltd (i.e. Brait S.E. (the "Brait Shareholder" (together with the Brait Bondholder, referred to as "Brait")) and management (the "Existing Shareholders")). It will have newly incorporated companies, known for the purposes of the Restructuring as "MidCo", "BidCo" and "FinCo". TopCo and its subsidiaries following the completion of the Restructuring are referred to as the "Restructured Group".

    (2) Administrators will be appointed over the Parent by its directors pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986 (the "Administrators").

    (3) The Parent (acting by the Administrators) will procure that the entire issued share capital of NLL will be sold to BidCo in consideration for £1 (the "NLL Sale"). NLL has negative net equity.

    (4) Consequent upon the NLL Sale and pursuant to the terms of the Existing Intercreditor Agreement:

        (a) The guarantees given by NLL and Retailers in respect of the Existing SSNs and the SNs will be released;

        (b) The existing debenture security granted by NLL and Retailers to secure their liabilities in respect of the Existing SSNs, the RCF, the Operating Facilities, the SNs and the FX Hedging will be released.

    (5) The claims of the holders of the Existing SSNs against the Secured Issuer and the other guarantors of the Existing SSNs (other than NLL and Retailers) will be deemed to be satisfied in the sum of £525,000,000 in respect of the Fixed Rate Notes and in the sum of €311,000,000 in respect of the Floating Rate Notes in consideration for:

        (a) the issuance by FinCo of £250,000,000 (sterling equivalent) 8% cash pay and 4% PIK senior secured notes due 2024 (the "**Reinstated SSNs**") and;

        (b) the right to subscribe (on a pro-rata basis) for 20% of the ordinary equity in TopCo,

    in each case, to the holders of the Existing SSNs, rateably in proportion to the amount of their existing holdings.

(6) Certain amendments will be made to the RCF Agreement and the Existing Intercreditor Agreement, and the RCF Lenders, the Operating Facility Lender, the Hedge Counterparties under the FX Hedge and the Trustees of the Reinstated SSNs and New Money Bonds (as defined below) will enter into a new intercreditor agreement (the "New Intercreditor Agreement"). The amendments to the existing intercreditor agreement are to conform the existing terms to the terms of the New Money Bonds, as well as changes consequential on the new holding structure for the Restructured Group.

(7) £150,000,000 of new capital will be raised by the issuance by FinCo of new 8% cash pay and 4% PIK senior secured notes due 2024 (the "New Money Bonds") to the lenders under the Bridge Facility. The proceeds of the New Money Bonds will be used to repay the Bridge Facility, pay the transaction costs and provide additional liquidity to the Group. Providers of the New Money Bonds will also receive the right to subscribe for 72% of the ordinary equity in TopCo (allocated on a pro-rata basis).

(8) New debenture security will be granted by NLL, FinCo and Retailers and certain other security by MidCo and BidCo to secure their liabilities in respect of the RCF, the Operating Facilities, the FX Hedging, the Reinstated SSNs and the New Money Bonds;

(9) 5% of the ordinary equity in TopCo will be reserved for the management incentive plan, while 1% of the ordinary equity in TopCo will be available for subscription by the Existing Shareholders (on a pro-rata basis).

(10) The holders of the SNs who have approved releases in respect of their holdings will be entitled to subscribe for 2% of the ordinary equity in TopCo (allocated pro rata to their holdings of SNs).

F. THE LOCK-UP AGREEMENT

25. The Group circulated a bondholder information pack on 16 January 2019, in which it sought support from its key financial stakeholders for a proposed lock-up agreement (the "Lock-Up Agreement") relating to the proposal for the Restructuring.

26. On 23 January 2019 the Group confirmed that the Parent, the Secured Issuer and, amongst others, holders of over 95% of the Existing SSNs, RCF Lenders holding 90% of the RCF and the lenders in respect of the Operating Facilities had entered into the Lock-Up Agreement. The Lock-Up Agreement had become effective in accordance with its terms on 22 January 2019.

27. Pursuant to the Lock-Up Agreement, the parties have agreed, amongst other things:

(1) To take all actions required to implement the restructuring on the terms of the lock-up agreement;

(2) In the case of the holders of the Existing SSNs:

(a) To vote in favour of the Senior Secured Scheme;

(b) To receive a fee equal to 0.5% of the Existing SSNs held by them if they sign or accede to the Lock-Up Agreement by the record date for the secured senior scheme, with such fee payable on the completion of the restructuring; and

(c) In the case of the RCF Lenders, to implement certain amendments to the RCF as described in the RCF term sheet appended to the Lock-Up Agreement and vote in favour of the Parallel RCF Scheme.

28. As at 29 March 2019, the Lock-Up Agreement has been signed or acceded to by creditors representing 98.8% the Existing SSNs, 90% of the amounts outstanding under the RCF and 61.56% of the SNs.

G. THE SCHEMES

(1) Introduction

29. The Schemes are intended to implement certain aspects of the Restructuring, as detailed below.

30. Each of the Schemes is conditional on the approval of the other. It has been explained to me that the sanction order in respect of the Senior Secured Scheme will not be registered with Companies House unless a sanction order is made in respect of the RCF Scheme and *vice versa*.

(2) The Senior Secured Scheme

31. The Senior Secured Scheme is between the Secured Issuer and the "Senior Secured Scheme Creditors", being those of its creditors who are holders of the Existing SSNs, the trustee in respect of the Existing SSNs (the "Existing Senior Secured Trustee") and the common depository (the "Existing Senior Secured Common Depository"). The Secured Issuer considers that the beneficial owners of and/or the persons with the ultimate economic interest in the Existing SSNs are those whose votes should be counted in respect of that interest. Such creditors are contingent creditors as they have a right to call for definitive notes in certain circumstances (including a default by the Secured Issuer): see section 2.06 of the Existing SSNs Indenture.

32. Granting voting rights to the persons with the underlying beneficial interests reflects the economic reality, and reflects the approach taken in cases such as *Re Castle Holdco 4 Ltd*, [2009] EWHC 3919 (Ch) at [22]-[24]; *Re Gallery Capital SA*, unreported 21 April 2010 and *Re Co-operative Bank*, [2013] EWHC 4072 (Ch). To avoid double counting, the Existing Senior Secured Trustee and the Existing Senior Secured Common Depository have confirmed that they will not exercise any voting rights in respect of the Senior Secured Scheme.

33. Specifically, the Senior Secured Scheme will provide for:

(1) The exchange of a proportion of all Existing SSNs for:

(a) The Reinstated SSNs; and

(b) The right for holders to subscribe (on a pro-rata basis) for 20% of the ordinary equity in TopCo,

in each case to the holders of the Existing SSNs rateably in proportion to the amount of their holding;

(2) The release of guarantees provided by NLL and Retailers to the holders of the Existing SSNs;

(3) The release of the claims of the holders of the Existing SSNs against the Secured Issuer and the guarantors of the Existing SSNs (other than NLL and Retailers) in the sum of £525,000,000 in respect of the Fixed Rate Notes and in the sum of €311,000,000 in respect of the Floating Rate Notes; and

(4) Authorisation and direction to the relevant parties to enter into certain restructuring documents, including the New Intercreditor Agreement and amendments to the Existing Intercreditor Agreement and associated documents.

34. Following the implementation of the Restructuring, the holders of the Existing SSNs will hold:

(1) Reinstated SSNs in amount of their pro-rata share of the Existing SSNs;

(2) Shares in TopCo in the pro-rata entitlement of 20% of the ordinary equity in TopCo; and

(3) Residual claims (expected to have no value):

(a) In relation to the Existing SSNs in an amount equal to their pro-rata entitlement of the amount of the unreleased balance remaining outstanding against the Secured Issuer; and

(b) Against the other guarantors of the Existing SSNs (save for NLL and Retailers) in the equivalent amount.

(3) The Parallel RCF Scheme

35. The Parallel RCF Scheme is between NLL and those of its creditors who are RCF Lenders.

36. The Parallel RCF Scheme will provide for:

(1) The amendment and restatement of the RCF Agreement to make certain limited amendments to it as set out in the RCF term sheet;

(2) Authority for the RCF Agent to enter into the New Intercreditor Agreement on behalf of each of the RCF Lenders (which will be in substantially similar form to the Existing Intercreditor Agreement);

(3) Authority for the RCF Agent to agree to certain limited amendments to the Existing Intercreditor Agreement;

(4) Authority for the RCF Agent to waive the consultation period referred to in the Existing Intercreditor Agreement as it relates to the Restructuring; and

(5) Authority to the RCF Agent and Security Agent (as defined in the RCF) to execute connected and/or ancillary documentation relating to the Restructuring.

37. The Parallel RCF Scheme will not otherwise affect the claims of the RCF Lenders against NLL or Retailers. There will be no change to the economic terms applying under the RCF, nor will there be any write-down of the claims of the RCF Lenders.

H. JURISDICTION

(1) The jurisdictional questions

38. Three questions – I shall term them jurisdictional questions, although the third goes more to whether the court, having jurisdiction, will make the order or orders sought – arise:

(1) Whether the Court has jurisdiction over the Scheme Companies;

(2) Whether the Court has jurisdiction over the Scheme Creditors; and

(3) Whether, if approved, the Schemes will be likely to have a substantial effect.

39. I consider these three questions below. In cases where there may be development of the evidence – which is the case in relation to the third question, where (as yet) there is no evidence on point – it is not appropriate for the court to reach a concluded view at the convening stage. Rather, the court should satisfy itself that there is no obvious jurisdictional impediment *Re Noble Group Ltd*, [2018] EWHC 3092 (Ch) per Snowden J at [77] to [81].

40. However, where the jurisdictional question is hard-edged – in the sense that it is not dependent on future evidence and can be determined at the convening stage – it seems to me that it is appropriate for the court to reach a concluded view at the convening stage, rather than to let the matter hang undetermined.

(2) Jurisdiction over the Scheme Companies

41. In this case, jurisdiction over the Scheme Companies is straightforward. The Scheme Companies are companies incorporated in England and Wales and therefore are "companies" within the meaning of Part 26 of the Companies Act 2006.

42. The fact that the Scheme Companies are incorporated in England and Wales also means that there is a sufficient connection with the jurisdiction. In addition, the RCF is governed by English law. Whilst the Existing SSNs are governed by New York law, this is no bar to them being the subject of a scheme, so long as the scheme company otherwise has a sufficient connection to the jurisdiction: see, for example, *Re Magyar Telecom*, [2014] BCC 448.

43. I find that there is jurisdiction over the Scheme Companies.

(3) Jurisdiction over the Scheme Creditors

44. There is a further issue as to whether the court has to be satisfied that it has jurisdiction over some or all of the Scheme Creditors in accordance with the provisions of the recast Judgments Regulation. (The recast Judgments Regulation replaced the Judgments Regulation with effect from 10 January 2015. As a result, the Article numbers of the Regulation have changed so that (for example) what was Article 2 is now Article 4 and what was Article 23 is now Article 25.)

45. This issue has been debated in a number of the scheme cases: see, for example, *Re Global Garden Products*, [2017] BCC 637 at [25]. In order to avoid having to decide whether the Judgments Regulation applies to schemes, the courts have generally adopted the practice of considering whether jurisdiction to sanction the scheme would exist <u>on the assumption</u> that the recast Judgments Regulation applies.

46. On the assumption that the recast Judgments Regulation applies to schemes, and treating the company as a claimant which is suing the scheme creditors, the courts have consistently held that Article 8 of the Judgments Regulation is potentially engaged as an exception to the normal rule (Article 4) that defendants must be sued in the place of their domicile: *Re Global Garden Products* at [25]. Article 8(1) enables a person domiciled in a Member State to be sued, where he is one of a number of defendants, in the courts for the place where any of the defendants is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

47. The approach which has been taken in the majority of cases is that, provided that one scheme creditor is domiciled in the United Kingdom, then Article 8 will be engaged and it will be expedient to hear the application for the scheme as regards other creditors: *Re Global Garden Products* at [25]; *Re Metinvest*, [2016] EWHC 79 (Ch) at [32];; *Re DTEK Finance plc*, [2016] EWHC 3563 (Ch) at [25]; *Re DTEK Finance plc*, [2017] BCC 165 at [18]; *Re Bibby Offshore Services plc*, [2017] EWHC 3402 (Ch) at [15]; *Re Lehman Brothers*, [2018] EWHC 1980 (Ch) at [178].

48. In some cases it has been suggested that it may not be enough to identify a single creditor domiciled in the United Kingdom, and that the court should consider whether the number and size of creditors in the UK are sufficiently large: see *Re Van Gansewinkel Groep*, [2015] EWHC 2151 (Ch) at [51]); *Global Garden Products* at [25]; *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at [114] to [116].

49. There is no need to decide this point in the case of the present application, although I would observe that other cases (notably competition cases) dealing with "anchor" defendants strongly suggest the first, more liberal, approach is the better one. In the present cases, whichever view is taken, there is no difficulty: 12 of the holders of the Existing SSNs are domiciled in England and Wales, representing approximately 11.5% by value of the holders of Existing SSNs; and 5 out of 6 RCF Lenders, representing 90% by value of the Parallel RCF Scheme Creditors, are domiciled in England and Wales.

50. I conclude that there is jurisdiction over the Scheme Creditors.

(4) Substantial effect

51. As well as showing a sufficient jurisdictional connection with England, it is also necessary to show that the Schemes, if approved, will be likely to have a substantial effect in any foreign jurisdictions involved in or engaged by the Schemes. This is because the court will generally not make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose: *Sompo Japan Insurance Inc v Transfercom Ltd*, [2007] EWHC 146 (Ch); *Re Rodenstock GmbH*, [2011] EWHC 1104 (Ch) at [73]-[77]; *Re Magyar Telecom BV*, [2013] EWHC 3800 (Ch) at [16].

52. In the present case:

    (1) The Scheme Companies are English companies;

    (2) The Parallel RCF Scheme will be effective to vary and discharge, as a matter of English law, the English law contractual obligations under the RCF; and

    (3) It is intended to seek recognition and approval of the Senior Secured Scheme under Chapter 15 of the United States Bankruptcy Code which will have the effect of making the Senior Secured Scheme effective to prevent the Senior Secured Scheme Creditors from enforcing their original (and unvaried) New York law rights under the Existing SSNs.

53. On the question of substantial effect, I can reach no concluded view. As I have noted, on this point, evidence has yet to be adduced. However, I am satisfied, in all the circumstances, that there is no obvious jurisdictional impediment.

54. On that basis, I proceed to consider the proposed meetings of Scheme Creditors.

I. PROPOSED MEETINGS OF SCHEME CREDITORS

(1) Introduction

55. In accordance with the *Practice Statement (Companies: Schemes of Arrangement)*, [2002] 1 WLR 1345, the principal issue for the court at the present stage is to be satisfied that the Scheme Companies' proposals for the summoning of meetings of creditors to consider the Schemes are appropriate. In particular, the court is required to consider whether more than one meeting of creditors is required and, if so, what is the appropriate composition of the meetings.

(2) The *Practice Statement*

56. The *Practice Statement* is aimed at avoiding the sort of problems which occurred in *Re Hawk Insurance Co Ltd*, [2001] 2 BCLC 480, by encouraging any issues relating to the constitution of the meetings of creditors summoned in order to consider a proposed scheme to be determined at the stage when the Court directs the summoning of those meetings (i.e. at the present stage).

57. The *Practice Statement* provides that:

(1) It is the responsibility of the applicant by evidence in support of the application or otherwise to draw to the attention of the court as soon as possible any issues which may arise as to the constitution of meetings or which otherwise affect the conduct of those meetings.

(2) For this purpose, unless there are good reasons for not doing so, the applicant should take all steps reasonably open to it to notify any person affected by the scheme that it is being promoted, the purpose which the scheme is designed to achieve, the meetings of creditors which the applicant considers will be required and their composition.

(3) In considering whether or not to order meetings of creditors, the court will consider whether more than one meeting of creditors is required and, if so, what is the appropriate composition of that meeting.

(3) The *Practice Statement* letters

58. In accordance with the *Practice Statement*, on 15 March 2019, the Scheme Companies notified Scheme Creditors of the intention to apply for orders convening meetings of creditors. The letters encouraged Scheme Creditors, if they wished to argue that the proposals for convening the Scheme meetings were inappropriate, or to raise any other issue in relation to the constitution of the Scheme meetings or which might otherwise affect the conduct of the Scheme meetings, to attend before the court at the hearing of the present applications.

59. There were no responses received to the *Practice Statement* letters.

(4) The test for the appropriateness of the proposed meetings

60. The test as to whether more than one meeting of the creditors with whom the scheme is proposed is necessary is whether the rights of those creditors against the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest: *Re Hawk Insurance* at [26]. As the Court of Appeal stated in *Hawk* at [30]:

> "In each case [the] answer to the questions will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."

61. In *Re UDL Holdings Ltd*, [2002] 1 HKC 172, Lord Millett set out the relevant principles as follows at pp.184-185:

> "(2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.
>
> (3) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.

(4) The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class."

62. The application of this test requires a consideration of:

(1) The rights of the creditors in the absence of the Scheme; and

(2) Any new rights to which the creditors become entitled to under the Scheme.

If there is a material difference between the rights of the different group of creditors under (1) or (2), they may (but not necessarily will) constitute different classes. Whether they will do so will depend on a judgment as to whether such differences make it impossible for the different groups to consult together with a view to their common interest.

63. Hildyard J provided the following summary of the law in *Re Primacom Holding GmbH*, [2012] EWHC 164 (Ch) at [44]-[45]:

"…The golden thread of these authorities, as I see it, is to emphasise time and again…[that] in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing [rights] and the rights offered in the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.

I emphasise this point because it … enables the court to take a far more robust view as to what the classes should be and to determine a far less fragmented structure than if interests were taken into account."

64. Where, a scheme is proposed as an alternative to an insolvency procedure, the correct approach is to consider the rights which are to be released or varied under the scheme as the rights which creditors would have in the insolvency: *Re Hawk* at [42]. That is the situation in the present case.

(5) Proposed classes

65. In the case of the present applications:

(1) The Secured Issuer submits that the rights of the Senior Secured Scheme Creditors are sufficiently similar to enable them to consult together in relation to the Senior Secured Scheme.

(2) NLL submits that the rights of the Parallel RCF Scheme Creditors are sufficiently similar to enable them to consult together in relation to the Parallel RCF Scheme.

66. Accordingly, each Scheme Company proposed that it should convene one meeting of their respective Scheme Creditors for the purposes of voting on their respective Schemes. I consider whether this approach should be sanctioned in the following paragraphs. It is obviously necessary to consider each Scheme separately.

(6) Do the Senior Secured Scheme Creditors form one class?

67. The Senior Secured Scheme Creditors comprise creditors in respect of the Fixed Rate Notes (which are Sterling denominated) and the Floating Rate Notes (which are Euro denominated).

68. There are differences between the Fixed Rate Notes and the Floating Rate Notes both in terms of their denominated currencies and in terms of the interest that is payable. Neither of these differences is, in my judgment, sufficiently material to fracture the proposed single class of Senior Secured Scheme Creditors: see e.g. *Re Telewest Communications plc*, [2004] BCC 342 and *Re Co-operative Bank*, [2017] EWHC 2269 (Ch) at [31]-[32].

69. As I noted earlier, insolvency is, in this case, the correct comparator, and in an insolvency of the Secured Issuer, the Euro claims would be converted into sterling. Similarly, as regards the differences in interest rates, in an insolvency all the Senior Secured Scheme Creditors would have a liquidated claim to the sums then due, but any entitlement to future interest would not be paid. It follows that there is no material difference to their existing rights on an insolvency because neither the holders of the Fixed Rate Notes nor the holders of the Floating Rate Notes could expect to receive a return in respect of their future interest entitlements: *Re Primacom* at [52]-[53]; *Re McCarthy and Stone plc*, [2009] EWHC 712 (Ch) at [7].

70. All of the debts in respect of the Existing SSNs share the same ranking in respect of the security package I have described. Accordingly, each of the Senior Secured Scheme Creditors would have materially the same rights in an insolvency of the Secured Issuer.

71. As to the rights to be conferred on the Senior Secured Scheme Creditors by virtue of the Senior Secured Scheme, whilst some of the Senior Secured Scheme Creditors have acceded to the Lock-Up Agreement, it is well established that where the lock-up agreement had been offered to all scheme creditors, and the size of any additional payments under the lock-up agreement is sufficiently small that it will not materially affect the creditors' decisions on whether to vote for the Scheme, no separate class is needed: *Re Telewest Communications*; *Re McCarthy & Stone*; *Re DX Holdings Ltd*, [2010] EWHC 1513 (Ch); *Re NEF Telecom*, [2012] EWHC 2483 (Comm) at [25]; *Re Seat Pagine Gialle SpA*, [2012] EWHC 3686 (Ch); Re Primacom; and *Re Co-operative Bank*.

72. In the present case:

(1) All holders of the Existing SSNs are being given equal opportunity to accede to the Lock-Up Agreement (that opportunity remaining open until the Scheme Voting Record time, with 98.8% of the Existing SSNs having acceded to the Lock-Up Agreement at the time of the hearing of the applications).

(2) The fees payable pursuant to the Lock-Up Agreement are set at an amount (i.e. 0.5% of the Existing SSNs held by them) where they are unlikely to influence a Senior Secured Scheme Creditor's decision whether or not to support the Senior Secured Scheme and/or the Restructuring.

(3) The Senior Secured Scheme will affect the rights of each Senior Secured Scheme Creditor in the same way, regardless of whether a Senior Secured Scheme Creditor acceded to the Lock-Up Agreement.

73. It was also submitted that the holders of Existing SSNs who have become lenders under the Bridge Facility and who will subscribe for the New Money Bonds should not be put into a separate class for the purpose of voting on the Senior Secured Scheme. The transactions relating to the Bridge Facility and the New Money Bonds are separate and distinct from the Senior Secured Scheme and do not take place pursuant to it. Furthermore, all holders of Existing SSNs were given the opportunity to participate in the Bridge Facility and the New Money Bonds.

74. An outcomes analysis prepared by Goldman Sachs illustrates the differences in returns pursuant to the Senior Secured Scheme, depending on whether Senior Secured Scheme Creditors have participated in the Bridge Facility or acceded to the Lock-Up Agreement. This demonstrates that the differences in return to those who have done so are insufficiently material to fracture the proposed Existing SSN class.

75. I am also satisfied that consideration has been given to other interests that the Senior Secured Scheme Creditors may have. In particular, Brait is a significant holder of the Existing SSNs and the majority shareholder of Topco Gun Bidco Ltd (which wholly owns NLRGL). As the majority shareholder in Topco Gun Bidco Ltd, it will be the main beneficiary of the 1% ordinary equity in TopCo being available for subscription by the Existing Shareholders. This is, however, merely a potential difference in the interests of the Brait Bondholder and other Senior Secured Scheme Creditors, not a difference in legal rights, and is therefore not a ground for calling separate meetings: see *Re UDL Holdings* at p.184 where Lord Millett explained that the fact individuals might hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings. In any event, even if the entitlement of the Brait Shareholder to receive equity in the Restructured Group was in theory capable of impacting the appropriate class composition, the equity to which it is entitled is so small that in the present case this would not require the formation of a separate class.

76. For all these reasons, I conclude that the rights of all the Senior Secured Scheme Creditors are sufficiently similar so as not to make it impossible for them to consult together with a view to a common interest.

(7) Parallel RCF Scheme Creditors form one class

77. NLL likewise submits that the rights of all the Parallel RCF Scheme Creditors are sufficiently similar so as to make it possible for them to consult together with a view to a common interest in circumstances where:

(1) All Parallel RCF Scheme Creditors have materially the same rights against the Group, in that they are participants in a single facility on the same terms whose claims against NLL rank *pari passu* as between themselves.

(2) If the Parallel RCF Scheme becomes effective in accordance with its terms, the existing rights of each Parallel RCF Scheme Creditor under the RCF will be affected in materially the same way.

78. For the same reasons as set out above, the Lock-Up Agreement is irrelevant to class composition in the context of the Parallel RCF Scheme. Indeed, given that the Lock-Up Agreement confers no entitlement to fees on the RCF Scheme Creditors for supporting the Parallel RCF Scheme, the fact that some but not all RCF Scheme Creditors became parties to the Lock-Up Agreement does not require the formation of a separate class.

79. I conclude that the rights of all the Parallel RCF Scheme Creditors are sufficiently similar so as not to make it impossible for them to consult together with a view to a common interest.

J. DISPOSITION

80. In all the circumstances, I conclude that meetings of Scheme Creditors should be convened in accordance with the draft orders (and other documents) before me. I grant both applications, for the reasons given in this ruling.