Neutral Citation Number: [2023] EWHC 2915 (Ch)

Case No: CR-2023-006234

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/11/2023

Before :

MR JUSTICE ADAM JOHNSON

- -

IN THE MATTER OF PLUSHOLDING GMBH
AND IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

Daniel Bayfield KC and Charlotte Cooke (instructed by **Latham & Watkins (London) LLP**) for the **Company**

Hearing dates: 15 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 17 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson :

Introduction

The Present Application and Background

1. This is an application on behalf of PlusHolding GmbH (the "*Company*") to convene a single meeting (the "*Scheme Meeting*") of creditors (the "*Scheme Creditors*") to consider and, if thought fit, approve a scheme of arrangement (the "*Scheme*") under Part 26 of the Companies Act 2006 (the "*CA 2006*").

2. The Company is a holding company, incorporated under the laws of the Federal Republic of Germany. It is part of a wider group of companies (the "*Group*"). The Group's main operating company is a German-incorporated wholly owned subsidiary of the Company, PlusServer GmbH ("*PlusServer*").

3. The Group operates a data and information technology infrastructure services business. In recent years the business has been adversely affected by a number of challenging economic and operational factors.

4. The key financing arrangements of the Group consist of a €190,000,000 Term Loan B Facility and a €70,000,000 Incremental Facility (together the "*Term Facilities*") owing to an overall group of 36 lenders under an initial senior facilities agreement (as amended) (the "*Senior Facilities Agreement*") and a later incremental facility commitment notice. These 36 lenders are the Scheme Creditors.

5. The borrowers in respect of the Term Facilities are the Company and PlusServer (the "*Borrowers*").

6. The Term Facilities are governed by English law.

7. As at 20 October 2023 the aggregate amount outstanding under the Term Facilities was €264,684,680 (comprising principal and unpaid accrued interest).

8. The Term Facilities are due to mature on 31 August 2024.

9. In view of the financial difficulties encountered by the Group and the impending maturity of the Term Facilities, the Company and others in the Group including its indirect holding company, PlusInvestment GmbH (the "*Target*") and its holding company, Phoenix Lux Acquisition S.à.r.l (the "*Shareholder*") propose to implement a comprehensive restructuring of the Group's financial indebtedness (the "*Restructuring*").

10. To that end there have been discussions with an ad hoc group of institutions that are either lenders under the Term Facilities (and therefore Scheme Creditors) or associated investment managers or investment advisers (the "*Ad Hoc Committee*").

11. The Restructuring will, amongst other things, entail a transfer of ownership of the Group to the Scheme Creditors and a "*reinstatement*" of the debt under the Term Facilities. In addition, each Scheme Creditor has been afforded the entitlement to subscribe for a *pro rata* share of a new super senior term loan facility in an aggregate amount of up to €15,000,000 (the "*New Money Facility*").

12. Of the 36 Scheme Creditors some 35, holding approximately 91.2% of the outstanding principal liabilities under the Term Facilities, have now entered into, or acceded to, a lock-up agreement to assist with the implementation of the Scheme (the "*Lock-Up Agreement*"). The Company is hopeful that the final Scheme Creditor will also accede to the Lock-Up Agreement shortly.

13. Despite this high degree of consensus, the Scheme is seen as an important part of the Restructuring because certain Scheme Creditors which are collateralised loan obligations vehicles ("*CLO vehicles*"), comprising approximately 3.88 per cent. in value of the Term Facilities, are unable for constitutional or governance reasons to approve a consent request to effect the Restructuring under the Senior Facilities Agreement (which would require 100% approval by value). These parties have entered into or acceded to the Lock-Up Agreement as so-called "*Abstaining Lenders*" (who will neither vote in favour of the Scheme nor oppose it).

Key Features of the Scheme

14. The Lock-Up Agreement incorporates term sheets that set out the key terms of the Restructuring (namely the "*Debt Term Sheet*", the "*Equity and Governance Term Sheet*" and the "*Exit Term Sheet*"). For present purposes, the key components may be summarised as follows:

    i) The Shareholder will consensually transfer its shares in the Target to a newly incorporated vehicle, the equity in which will be held indirectly by Scheme Creditors rateably to their holdings in the Term Facilities.

    ii) In accordance with the Debt Term Sheet:

        a) The Term Facilities will be reduced to an amount not less than €95,000,000 and their maturity extended to 31 December 2028 (the "*Reinstated TLB*").

        b) The balance of the amount outstanding in respect of the Term Facilities (including principal of up to €165,000,000 plus accrued unpaid interest) will be "*hived up*" and "*reinstated*" as a PIK term loan facility issued by a new holding company which will mature on 31 December 2028 (the "*HoldCo PIK Facility*").

        c) Each Scheme Creditor will be entitled to its pro rata share of the debt under the Reinstated TLB and the HoldCo PIK Facility.

        d) Each Scheme Creditor has been invited to subscribe for a *pro rata* share of the New Money Facility in an aggregate amount of up to €15,000,000. The New Money Facility will mature on 31 July 2028. It has been backstopped by the Ad Hoc Committee on a *pro rata* basis, with participation in the backstop arrangements also having been made available to all Scheme Creditors on a pro rata basis. I understand that the deadline for participating either as backstop provider or as lender under the New Money Facility has now passed, and the only Scheme Creditors who have agreed to do so are the members of the Ad Hoc Committee.

iii) In accordance with the Equity and Governance Term Sheet, certain governance arrangements will be put in place with respect to the restructured Group. These include the appointment of a new Advisory Board at the level of the Target, the right on the part of the presently largest Scheme Creditor to nominate the Chairman and appoint two non-executive members to that Board, and the right on the part of each of the Ad Hoc Committee and the group of lenders that are CLO vehicles to nominate one of the proposed independent non-executive members.

iv) In consideration for their cooperation, a number of parties, including the Scheme Creditors, will receive releases of liability relating to the Restructuring, the Senior Facilities Agreement and their direct or indirect ownership or management of, or other conduct in respect of, the Group in accordance with the terms of the Exit Term Sheet (the "*Releases*").

15. There are certain conditions precedent to the Restructuring. These include receipt of a final tax ruling from the German tax authorities and merger control approval, but the Company is confident these approvals will be obtained and that the Restructuring Conditions will be fulfilled by the long-stop date for the Scheme which is 29 February 2024.

The Comparator Scenario

16. As to what is likely to happen if the Scheme is not sanctioned, the Company considers that Scheme Creditors would provide the necessary short term funding to enable either: (i) a lender led acquisition (in order to implement a transaction broadly comparable to the Scheme); or, alternatively (ii) the sale of the business to a third party. Accordingly, if the Scheme is not approved by the Scheme Creditors, a security enforcement and share sale at the holding company level is considered to be the most likely outcome (the "*Comparator Scenario*").

17. A comparator report has been prepared by FTI Consulting LLP, but this suggests a materially lower recovery for the Scheme Creditors as compared with the outcome under the Scheme owing to the operational impact on the Group and the cost of the additional funding to address short-term liquidity requirements. It is considered that there would be a distressed discount of between 10% and 35% with respect to the returns to Scheme Creditors in the Comparator Scenario, and a return of between 30.9c and 37.8c in the € under the Term Facilities.

The Present Issues

18. Having summarised the background I now turn to consider the issues which arise for consideration at this stage.

Notice of Convening Hearing

19. To start with, I am satisfied that sufficient notice has been given of the present hearing. The Practice Statement Letter is dated 31 October 2023, just over two weeks ago, but even before that a summary of the latest business plan and the key terms of the Restructuring was presented to all non-Ad Hoc Committee Lenders on 28 September 2023; a summary of the Term Sheets and the Restructuring was presented

to a virtual meeting held on 16 October 2023; and advanced drafts of the Lock-Up Agreement and Term Sheets were made available to all Scheme Creditors on 25 October 2023. Thus, there has been ample time for the Scheme Creditors, who are all commercial institutions of one sort or another, to familiarise themselves with the key elements of the Scheme, certainly in the sense of being able to identify issues of the type required to be resolved at the convening stage.

Jurisdiction

20. I am satisfied that there is jurisdiction under the terms of the statute. The statutory language requires only that there is a compromise or arrangement between a company and its creditors (or members) or any class of them: section 895(1)(a) CA 2006. As a matter of construction, the word "*company*" includes a foreign company such as the present applicant: see section 895(2)(b) of the CA 2006 and Re Drax Holdings Ltd [2004] 1 WLR 1049 at [20] and [28] per Lawrence Collins J. I can also be satisfied here that there is an "*arrangement*" in the relevant sense, since the Scheme involves a compromise of existing rights in return for new ones and thus obviously contains the necessary elements of give and take: see Re Savoy Hotel Ltd [1981] Ch 351 (Nourse J) and Re Lehman Brothers International (Europe) [2019] BCC 115, per Hildyard J at [64].

21. I note it is a separate question whether there is jurisdiction in the international sense. This is regarded as a matter of discretion, the question being whether the wide jurisdiction conferred by the statute should in fact be exercised in the circumstances of the particular case. Critical to that analysis is whether there is a sufficient degree of connection with England & Wales to justify the Court exercising its statutory power.

22. These are matters to be resolved at the sanction hearing, but I note here that the core obligations sought be compromised under the Scheme are the English law obligations owed under the Term Facilities. The approach in many scheme cases involving the compromise of contractual obligations owed under English law has been to seek relief from the English Court, since that is considered necessary in order to promote the international effectiveness of the scheme. These factors in combination often justify the conclusion that there is a sufficiently close connection with this jurisdiction to warrant exercise of the statutory power.

23. Such matters will need further consideration in due course. For now it is sufficient to record that there are no issues of special concern which militate against the Court convening a meeting or meetings of creditors.

Class Composition

24. The basic rule is well known. A class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 (Bowen LJ).

25. Here, it seems to me as a matter of first impression that the Scheme Creditors form a single class. The Scheme Creditors' existing rights against the Company are materially identical since each Scheme Creditor is a lender in respect of the Term Facilities on materially the same terms pursuant to the Senior Facilities Agreement. Likewise, if the

Scheme becomes effective, the Scheme Creditors' rights will be compromised in effectively the same way and there will be no materially different treatment of Scheme Creditors under the Scheme since all Scheme Creditors will receive the same consideration on a rateable basis.

26. There are some possible contrary-indicators, which Mr Bayfield KC has properly drawn attention to, but on analysis it seems to me that none of them has the effect of fracturing the single class. I will take the points in turn.

27. *Lock-Up Agreement*: The fact that a lock-up agreement has been put in place will not by itself operate to fracture a class of creditors: Re Telewest Communications plc (No.1) [2004] EWHC 924 (Ch) at [53]. In the present case, there is nothing about the particular terms of the Lock-Up Agreement which could do so. No consent fee has been paid under the Lock-up Agreement, so those who have signed it are in no different position in strict financial terms than the one remaining creditor who has not. Further, the Lock-Up Agreement has been open for signature to all Scheme Creditors, and indeed remains open for signature. The Scheme itself impacts the rights of all Scheme Creditors in the same way, regardless of whether they have signed the Lock-Up Agreement or not.

28. *New Money Facility*: Two benefits fall to be considered, namely (1) a "*Backstop Fee*" in an amount equal to 3% payable to those Scheme Creditors who have agreed to underwrite the New Money Facility by acting as backstop providers, and (2) for those Scheme Creditors who have agreed to participate as lenders under the New Money Facility, an original issue discount of 4% (the "*OID*"). In each case, the benefit is payable in kind – i.e., it is added to the overall amount owing to the relevant Scheme Creditors under the New Money Facility.

29. Neither point to my mind has any impact in terms of class composition.

30. Taking them in turn, there are many cases in which the Court has held that backstop fees did not fracture the class: see e.g. Re Pizza Express Financing 2 Ltd [2020] EWHC 2873 (Ch) at [42]. There is nothing unusual about this case. The backstop fee is no more than a commercial payment reflecting appropriate pricing for the level of credit risk involved on the part of the backstop providers, which all Scheme Creditors were given the opportunity of obtaining.

31. The same broad logic applies also to the OID. This is payable to each lender under the New Money Facility upon any repayment, prepayment or refinancing of the loans owing to it under the New Money Facility, rateably to each lender's New Money Facility commitment that is repaid, prepaid or refinanced. Again, this does not fracture the class because it is merely a feature of the pricing of the New Money Facility and each Scheme Creditor was given the same opportunity to participate in the New Money Facility rateably to its holdings under the Term Facilities.

32. In short, I see nothing in either form of benefit which would prevent those who receive them from consulting together, vis-à-vis the terms of the Scheme, with other Scheme Creditors who for their own commercial reasons have chosen not to participate as backstop providers or lenders under the New Money Facility. As Mr Bayfield KC put it, whatever may be the position as regards the new money element, there is an obvious unity of interest between all Scheme Creditors as regards the basic choice they will

have to make between their projected returns in the Comparator Scenario and their potential returns under the Scheme.

33. *Fees and Expenses of the Ad Hoc Committee's Advisers*: The Company has agreed to pay certain professional fees incurred by the members of the Ad Hoc Committee. Consistent with the prevailing orthodoxy, in my opinion this arrangement does not have the effect of fracturing the class. Its effect is not to not confer any bounty or net benefit on the relevant Scheme Creditors, but only to defray the expenses and disbursements they have actually incurred as a result of the restructuring: see Re Codere Finance 2 (UK) Ltd [2021] 2 BCLC 396 at [68]-[69] and [101]-[104] per Falk J. I do not see that such an arrangement should prevent those who benefit from it from being able to consult together with those who do not in their common interest, as regards the desirability of the Scheme versus the Comparator Scenario.

34. *Releases:* The Releases are set out in a Global Deed of Release. The intention is that mutual releases are granted to a number of parties, including the Scheme Creditors, as regards potential liabilities arising from a range of matters including the Restructuring and the management of the Group.

35. On the face of it this presents no issue, because all Scheme Creditors benefit from the Releases. However, Mr Bayfield KC has rightly drawn attention to the fact that the position of the members of the Ad Hoc Committee is somewhat different, because as far as they are concerned, the Releases extend to their activities on behalf of the Ad Hoc Committee. That is true, but I think Mr Bayfield KC is also correct that this does not affect the overall analysis. It seems to me that the Scheme Creditors are all treated equally in the sense that they are all given the benefit of a clean slate and I do not think that it matters, in this case at least, that the individual circumstances of some Scheme Creditors are different because they chose to become members of the Ad Hoc Committee. If there is an additional benefit to them, it is not of such materiality as to call into question their ability to consult together with other Scheme Creditors in relation to the overall desirability of the Scheme.

36. *Governance benefits*: I have mentioned these above. I mean the right on the part of the presently largest Scheme Creditor to nominate the Chairman and appoint two non-executive members to the Advisory Board of the Target, and the right on the part of each of the Ad Hoc Committee and the group of lenders that are CLO vehicles to nominate one of the proposed independent non-executive members.

37. These are certainly additional rights which distinguish the positions of those who benefit from them, but all the same in my opinion they do not fracture the class in the required sense – i.e., in the sense of making it impossible for all Scheme Creditors to consult together vis-à-vis the Scheme in their common interest. The rights are only in the nature of the right to nominate members of the Advisory Board, and as I understand it, the point of the Advisory Board is to safeguard the interests of *all* the shareholders in the Target, who will include (indirectly) *all* the Scheme Creditors. The interests of all the Scheme Creditors should in that sense be aligned. Viewed in that way, I do not for myself see that the nomination rights afforded to some only are of such materiality as to make it impossible for the Scheme Creditors as a whole to consult together in their common interest as regards the potential benefits of the Scheme versus the Comparator Scenario.

Other Matters

38. I am satisfied that the Explanatory Statement is adequate, having regard in particular to the relative level of sophistication of the Scheme Creditors. I am also satisfied that there are no obvious roadblocks which might operate to limit or impede the operation and effectiveness of the Scheme.

Conclusion

39. In light of the above, I will make an Order for the convening of a single meeting of Scheme Creditors, in the terms proposed by the Company.