



Neutral Citation Number: [2020] EWHC 1773 (Ch)

Case No: CR-2020-002651

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

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Wednesday, 24th June 2020

Before:

MR. JUSTICE MILES

Between:

**IN THE MATTER OF SWISSPORT FUELLING LTD
AND IN THE MATTER OF THE COMPANIES ACT 2006**

MR. DANIEL BAYFIELD QC and MR. RYAN PERKINS (instructed by **White & Case LLP**) appeared on behalf of the **Company**.

MS. FELICITY TOUBE QC (instructed by **Latham & Watkins LLP**) appeared on behalf of the **Ad Hoc Group**

Approved Judgment

Transcript of the Stenograph Notes by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE MILES :

1. This is an application by Swissport Fuelling Limited (the Company) for the court's sanction under section 899 of the Companies Act 2006 of a scheme of arrangement. The Scheme was considered at a meeting on 19 June 2020 convened pursuant to an order made by me on 5 June 2020.
2. The background to the Scheme is summarised in the convening judgment given on 5 June 2020 [2020] EWHC 1499 (Ch). For convenience, I repeat what I said there at [3] to [19]:
 3. The Company is part of the Swissport Group of companies (“the Group”), which is the world's largest provider of ground and cargo handling services to the aviation industry. The Group employs about 65,000 people. Due to the Covid 19 pandemic, the Group has witnessed a rapid and drastic reduction in revenues, as a result of falling passenger numbers, and reduced airline activity. The Group is now facing a severe liquidity crisis, with its available cash resources expected to drop to a critical level by the final week of July 2020. To address this liquidity crunch the Group wishes to be able borrow up to €380 million of new money under a new loan facility (“the New Money Facility”). This will provide the Group with the liquidity it needs to carry on business for the next six to nine months. During that period the Group also intends to seek to implement a broader restructuring of its financial liabilities, with a view to carrying on operating as a going concern over the longer term.
 4. The Group's existing financial liabilities arise under a number of different debt instruments and credit facilities. These include a Credit Agreement dated 14 August 2009 by which the Group has borrowed something over €1 billion under three different facilities. There is also an Intercreditor Agreement of the same date, which governs the ranking of liabilities under the Credit Agreement and certain other liabilities of the Group.
 5. The scheme creditors and the lenders under the Credit Agreement. Any New Money Facility is bound to have to be given a ranking ahead of the existing senior liabilities of the Group. Any lenders of new money would require that super senior ranking. To enable this to happen, the consent of the lenders under the Credit Agreement and the Intercreditor Agreement is required, and the principal purpose of the proposed scheme is to effect that consent.
 6. There is also a secondary purpose to the scheme, which is to make further changes to the Group's financing documents to give it greater flexibility to bring about a broader restructuring of its debt capital over time. If the New Money Facility can be obtained on satisfactory terms the Group believes that it will have a better chance of surviving its current liquidity crisis.
 7. At the end of 2019, before the current pandemic largely grounded the aviation industry, the Group provided handling and cargo services at some 300 airports. The ultimate parent company of the Group is Swissport Group S.à r.l. All of the obligors under the Group's financing arrangements are its subsidiaries.

8. The Credit Agreement is the largest source of financial debt of the Group. It is governed by New York law. It comprises three loan facilities: first, a Term Loan B facility, with a principal amount of €900 million, which matures on 14 August 2024; second, a Delayed Draw Facility, which has a principal amount of €50 million, and matures on 14 August 2024; and, third, a revolving credit facility, which has a principal amount of up to €75 million, and matures on 14 February 2024. The borrower under the Term Loan B Facility, and the Delayed Draw Facility, is a Luxembourg company called Swissport Financing S.à r.l.; and the borrower under the Revolving Credit Facility is Swissport International AG, a Swiss company (together "the Borrowers"). The liabilities of the Borrowers under the Credit Agreement are guaranteed by numerous members of the Group ("the Guarantors"). The Company is one of the Guarantors and is incorporated in England and Wales.

9. In addition to the Credit Agreement, the Group has a number of other main sources of financial indebtedness. These comprise, first, a series of senior secured notes ("the SSNs"), with aggregate principal amount of €410 million, and which mature in 2024. The second is a series of senior unsecured notes ("the SUNs"), which have an aggregate principal amount of €250 million and mature in 2025. Third, there is a payment in kind (or PIK) loan, which has a principal amount of €190 million, in which interest is periodically capitalised. That is structurally subordinated to the other forms of debt which I have just referred to and nothing more need be said about it at this stage.

10. The lenders under the Credit Agreement and the holders of the SSNs have the benefit of a security package over numerous assets of the Group. That security is vested in a Collateral Agent, on trust for those creditors. The SUNs are unsecured.

11. The contractual terms of the SSNs and the SUNs are set out in two indentures, which are governed by New York law.

12. The ranking of the Credit Agreement, the SSNs, and the SUNs, is the subject of the Intercreditor Agreement which is also governed by New York law. Under that agreement, the creditors under the Credit Agreement, and the SSNs, enjoy a senior ranking status with the security and rank on an equal basis. The SUNs are contractually subordinated to the senior secured debts of the Group.

13. As I have already said, the cash position of the Group will fall to a critical level by the end of July 2020, and the Group will, indeed, run out of cash in August 2020.

14. If the Group is unable to obtain significant new liquidity in short order, and if no alternative restructuring plan is implemented, it is likely that the Company, and other members of the Group, will be forced into insolvency or bankruptcy proceedings in a number of jurisdictions. It is likely that this would lead to a much poorer outcome for the Group's creditors.

15. The Group has taken advice from restructuring advisers, AlixPartners, who have carried out a preliminary analysis of the returns that creditors would be likely to receive in insolvency or bankruptcy proceedings. They have estimated

that in an insolvency involving multiple proceedings around the world, a liquidation of the Group's assets would be likely to occur, and the scheme creditors would be likely to recover less than 35% of the face value of their claims. This is to be compared with the current trading value of the debt on the secondary market at around 77% of face value.

16. Since April 2020, the Group has been engaged in negotiations with an ad hoc group of creditors, with a view to obtaining a new money facility. Those negotiations are continuing, and terms have not yet been agreed, although a term sheet has been circulated. Raising the new money will require various amendments which need to be made to the Credit Agreement and the Intercreditor Agreement. These will allow the Group to seek to raise new money on a super senior basis.

17. The Company has explained in its evidence, supported by an expert report by Mr. Daniel Glosband, an experienced US bankruptcy lawyer, that it is unnecessary to seek the consent of the holders of the SUNs in order to implement the necessary amendments. He says in summary that the new borrowing would fall under the definition of Permitted Debt under the SUN indenture, and that the consent of the holders of the SUNs would not be required for the relevant amendments. He also says that borrowing up to the amount which is proposed by the Group would not breach covenants under the SUNs. I do not need to determine the point conclusively, but on the evidence I have seen there appear to be good grounds for the conclusions reached by Mr. Glosband.

18. The evidence also shows that it is unnecessary for the scheme to embrace the SSNs as the necessary consent threshold for them is lower and they have consented to the proposed amendments to the finance documents.

19. The scheme is therefore restricted to the lenders under the Credit Agreement. The scheme will operate to bind the scheme creditors to the terms of two amendments agreements; one to amend the Intercreditor Agreement, and the other to amend the Credit Agreement. In mechanical terms, this will take place by the Company being appointed as attorney of the creditors to provide written consent on their behalf to the terms of the Scheme Amendment Agreements.

3. That summary of the position as of 5 June 2020 should be updated.
4. First, a further cash flow forecast has been prepared which shows a slight improvement in the Group's position. The "inner perimeter cash" is now expected to fall below the critical level of €80 million in late July or early August 2020. The Group continues to project that in order to cover the next six to nine months and avoid a cash flow crisis, it needs to obtain additional liquidity in the sum of €250 million to €350 million, with further funds likely to be required in due course.
5. Second, the debt is now trading on the secondary market at about 87%, which reflects the fact that if the current cash flow crisis can be resolved and the Group can continue to trade, there is substantial value.
6. Third, there is some updating about the steps taken to obtain a New Money Facility. The proposal put forward by the Ad Hoc Group of creditors on 2 June 2020 is still

being considered and negotiated. It remains the view of the directors that the Group is unlikely to be able to enter a New Money Facility without granting a super senior ranking akin to the Ad Hoc Group's proposal. There have been financing proposals which did not necessarily require this ranking, but the directors consider that these face significant problems and in some cases omit key terms, including as to the amount of the financing. The directors therefore consider that it is in the best interests of the Group and its creditors to press on with the Scheme and to continue to negotiate a New Money Facility on a super senior basis.

7. Fourth, there are further details of the holdings of the Ad Hoc Group. Of the lenders of record on 16 June 2020, its members represented some 56% of the Scheme Creditors by value. I was told that, including unsettled trades the holdings of the Ad Hoc Group now represent by value 73% of the Term Loan B facility, 100% of the Revolving Credit Facility and 95% of the Delayed Draw Facility.
8. Fifth, the position of the UK domiciled lenders has changed slightly. The same four UK domiciled lenders remain as lenders, though there are now 217 lenders of record in total. This has come about as a concentration of the debt as a result of members of the Ad Hoc Group increasing their exposure to the Credit Agreement Liabilities. The UK domiciled lenders now hold approximately 12.4% of the total commitments under the Credit Agreement.
9. The Scheme meeting was, as I have said, held on 19 June 2020. Pursuant to the convening order of 5 June 2020, there was a single meeting of the creditors to take place remotely by Webinar. The order of the 5 June 2020 also required the Chairman of the meeting to provide the court at this sanction hearing with information about the conduct of the meeting.
10. The report of the Chairman shows the following:
 - i) details of the Webinar meeting were provided to Scheme Creditors and other relevant participants on request by the Information Agent;
 - ii) following a registration process conducted by the Information Agent the meeting commenced. The Information Agent completed a roll call of participants during the introductory portion of the Scheme meeting, further to confirm who was in attendance for the purposes of the meeting, and to have each participant affirmatively confirm that they could hear the proceedings. All participants were able to provide such confirmation;
 - iii) While the Scheme Creditors were encouraged to keep their audio lines muted during the proceedings, Scheme Creditors could unmute their lines and speak at any time required. The Webex service also provided both a chat function and a raise hand function. The chat function allowed all participants on the call to communicate in writing with other participants, and the raised hand function would raise an alert to a designated host of a meeting. These functions were explained to the Scheme Creditors during the meeting, Scheme Creditors were also provided with an information sheet containing instructions on how to use the Webex service in advance of the Scheme meeting;

- iv) the Chairman asked the Scheme Creditors whether a separate discussion was required between Scheme Creditors and any other relevant participants and highlighted that a virtual breakout area could be arranged for such discussion at that time or thereafter. This was not requested by any Scheme Creditor at any point during the Scheme meeting; and
 - v) the Webinar technology worked well, no technological problems arose, and no Scheme Creditor reported any difficulty in joining or participating in the Scheme meeting.
11. I am satisfied that there were no difficulties for participating creditors in their ability to hear or ask questions or express opinions at the meeting or otherwise have their ability to contribute to the business of the meeting impaired.
12. The voting outcome at the meeting may be summarised as follows:
 - i) first, the Scheme was approved by 100% in number and value by the Scheme Creditors present and voting at the meeting in person or by proxy;
 - ii) second, a total of 157 Scheme Creditors holding claims of €893,200,000 voted in favour of the Scheme, with none of the Scheme Creditors voting against; and
 - iii) third, the turnout was high, with 81.87% of the total Scheme Creditors by value, and 72.35% by number, voting in person or by proxy.
13. The company now seeks the sanction of the court under section 899.
14. In *Re Telewest Communications plc (No. 2)* [2005] BCC 36, David Richards J referred, at [20] to [22], to the principles taken from a passage in the 13th edition of Buckley. The passage is well-known and I will not set it out here. In effect, there is a three stage test: the court must consider, first, whether the provisions of the Statute have been complied with; second, whether the class was fairly represented by the meeting and whether the majority who voted in favour of the Scheme acted *bona fide*; and, third, whether the Scheme is one which a creditor could reasonably approve (and if the Scheme is one which the creditor could reasonably approve, it is regarded as fair).
15. Turning to the first limb, I am satisfied that the meeting was convened and held in accordance with the order of 5 June 2020, and that the creditors were notified in accordance with that order. I am also satisfied that it was appropriate for the meeting of creditors to consist of a single class. I considered the issue of classes at the convening hearing, and set out my provisional views in [31] to [39] of the convening judgment. I remain satisfied that those views were correct, and that it was appropriate for the Scheme meeting to consist of a single class. I am therefore satisfied that the provisions of the Statute were complied with.
16. The second question is whether the class was fairly represented at the meeting and whether the majority acted *bona fide*. As to this, as I have already noted the Scheme was approved by all of the Scheme Creditors who voted, and they represented 81.87% of the total Scheme Creditors by value. I see no basis for any suggestion that

the creditors who supported the Scheme did not fairly represent the class or did not act *bona fide*. Counsel for the Company has noted that, of those Scheme Creditors voting at the meeting, 34, representing some 57% by value, are members of the Ad Hoc Group, but I do not think that this casts any doubt on whether the creditors who voted in favour fairly represented the class at the meeting or acted in any way other than *bona fide*. This reflects the fact that the Ad Hoc Group owns and controls the bulk of the debt under the Credit Agreement. The members of that group do not stand to receive any special benefit under the Scheme which is not available to other Scheme Creditors, and there is no suggestion that anyone outside of the Ad Hoc Group objects to the Scheme. I am therefore satisfied about the second limb of the test.

17. The third question is whether the Scheme is one which a creditor could reasonably approve. The starting point is again that the overwhelming majority of Scheme Creditors have approved the Scheme; and none of the Scheme Creditors who attended the meeting voted against it. The court does not simply register or rubber stamp the outcome of the meeting but, nonetheless, the court always gives significant weight to the views of creditors, as David Richards J said in *Telewest Communications (No 2)* at [22]:

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

18. Here there is no opposition to the Scheme and I can discern for reason for saying that an honest and intelligent creditor could not reasonably approve it. The likely alternative to the Scheme is a complex and uncoordinated insolvency process in a number of jurisdictions, which would lead to a far worse return for creditors. If it can be negotiated and put in place, a New Money Facility is likely to put the Scheme Creditors in a far better position they would otherwise be in, and it is highly unlikely that this would be possible unless the Scheme were approved. I am therefore satisfied that the Scheme is one which a creditor could reasonably approve.
19. Having considered the three limbs set out above, I am satisfied that the Scheme is fit to be sanctioned.
20. At the convening hearing I considered three groups of issues which may broadly be described as jurisdictional. The first is whether the Scheme constitutes a compromise or arrangement between the Company and its creditors or any class of them within s. 895 of the Companies Act 2006. The second is whether the Scheme can properly vary the Scheme Creditors' rights against third party obligors within the Group, including the Borrowers. The third is whether the court has international jurisdiction to sanction the Scheme, for example, under the Recast Judgments Regulation.
21. In the convening judgment I explained why I was provisionally satisfied on each of these points. No Scheme Creditor has advanced a contrary view and I am satisfied that the conclusions I reached on each of these points was correct.
22. I turn to the question of international recognition. In *Re Maqyar BV* [2014] BCC 448 at [16] David Richards J said:

"The court will not generally 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."

23. This raises the question of its international effectiveness. There is no requirement for a scheme of arrangement to be effective in every jurisdiction worldwide, and the court does not need to be certain that recognition would occur everywhere. However, the court will usually need to be satisfied that a Scheme is likely to be effective in key foreign jurisdictions: see *Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch) at [17] to [26]. That was a case about an insurance transfer scheme, but the same principles apply to a scheme of arrangement.
24. The Credit Agreement and the Intercreditor Agreement are governed by New York law. The company has adduced independent expert evidence that the Scheme will be recognised in the United States of America from Mr Daniel Glosband, a very experienced US bankruptcy lawyer. This report was also in evidence at the convening hearing. Mr Glosband concludes that the Scheme is likely to be recognised and given full force and effect in the US pursuant to Chapter 15 of the US Bankruptcy Code.
25. Notwithstanding that the Credit Agreement and Intercreditor Agreement are governed by New York law, Mr. Glosband notes that the US Bankruptcy Court has recognised a number of previous English schemes under Chapter 15, which varied or discharged the rights of creditors under finance documents governed by New York law. I am satisfied, in the light of that evidence, that the Scheme is likely to be recognised and given full force and effect in the United States.
26. The Group has conducted an analysis to identify other key jurisdictions where its assets are held. The most important jurisdictions aside from England and the US are Luxembourg and Switzerland, where the Group holds approximately 50% and 22% of its assets respectively. These are also jurisdictions where the Borrowers under the Credit Agreement are incorporated. I am also told that there is no other jurisdiction than those four where the company holds more than 5% of its assets.
27. So far as Luxembourg is concerned, the company has obtained an expert report from Mme Laurence Jacques. She is of the opinion that under the Recast Judgments Regulation the Scheme would be likely to be recognised in Luxembourg and that is true regardless of whether there is a no-deal Brexit at the end of the transition period under the European Union (Withdrawal Agreement) Act 2020. She is also of the opinion that the Scheme would likely be recognised under the general principles of Luxembourg private international law.
28. In *Re Lecta Paper UK Limited* [2020] EWHC, 382, (Chancery) at 41, Trower J explained that the Recast Judgments Regulation will continue to apply to the recognition of an English judgment in EU Member States, notwithstanding the occurrence of Brexit, provided that the judgment is being given in proceedings which were instituted before 31 December 2020, being the end of the transition period. He explained that this follows from Article 67(2) of the Withdrawal Agreement.
29. As regards Switzerland, the company has obtained a report from Professor Rodrigo Rodriguez as an independent expert on Swiss law. He is of the opinion that under the

Lugano Convention the Scheme would be likely to be recognised in Switzerland, and that this would continue to be the case even in the event of a no-deal Brexit at the end of the transition period. This is essentially because, in his view, an order made during the transition period should not cease to be recognised after the end of the transition period merely because a further deal is not concluded between the United Kingdom and the EU.

30. On the basis of the evidence, I am satisfied that the Scheme is likely to be recognised internationally in the key foreign jurisdictions.
31. The company seeks sanction for the Scheme in a form slightly modified from that before the court at the convening hearing. By clause 7.5 of the Scheme, Scheme Creditors authorised the Company to make any modifications to the Scheme that the court may think fit to approve at the sanction hearing, provided that the modification could not reasonably be expected directly or indirectly to have a material adverse effect on the rights and interests of any Scheme Creditor under the Scheme. This is a common provision in schemes of arrangement.
32. The Company proposes to make the small number of modifications to the Scheme. These are explained in Mr Waller's second statement. The amendments arise from the fact that a particular Group entity called Swissport Cargo Services LP ("SCS") acceded to the Credit Agreement as a Loan Party following the date of the convening hearing. This was necessary because the Group is seeking to obtain a state-supported funding package under which SCS would be a guarantor, and the terms of the Group's finance documents require an equivalent guarantee to be granted by that company in favour of the relevant financial creditors, including the lenders under the Credit Agreement. The result of the modifications is that SCS will now constitute an additional Relevant Obligor under the Credit Agreement, and will also be required to execute a document called "the Obligors' Undertaking" as defined in the Scheme. Amendments have therefore been made to the definition of "Relevant Obligor" and "the Obligors' Undertaking". The amendments were brought to the attention of the Scheme Creditors before the Scheme meeting, and Scheme Creditors were told that they could, should they so wish, revoke their vote, if already lodged in advance of a Scheme meeting, in the light of the amendments. None of the creditors did so.
33. The amendments could not, in my view, be reasonably expected, directly or indirectly, to have a material adverse effect on the rights and interests of any Scheme Creditor. To my mind they fall within the scope of clause 7.5, and I think it appropriate to approve the amendments in accordance with that clause.
34. In all the circumstances, I am satisfied that the Scheme should be sanctioned.
