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Case Nos: CR-2023-003084 and CR-2023-003085

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

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

Date: 21/06/2023

**Before :**

**MR JUSTICE ADAM JOHNSON**

**IN THE MATTER OF HILDING ANDERS INTERNATIONAL AB**  
**AND IN THE MATTER OF HILDING ANDERS LUX HOLDINGS S.A.R.L**  
**AND IN THE MATTER OF THE COMPANIES ACT 2006**

**David Allison KC and Ryan Perkins (instructed by Kirkland & Ellis International LLP) for**  
**the Applicants**

Hearing dates: 16 June 2023

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**Approved Judgment**

This judgment was handed down remotely at 10am on Wednesday 21 June 2023 by  
circulation to the parties or their representatives by e-mail and by release to the National  
Archives.

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## Mr Justice Adam Johnson:

### Introduction

1. This is an application for a Convening Order by two companies in what has been called the “*Hilding Europe and Asia Group*” (I will refer to it as “*the Group*”). These are Hilding Anders International AB (“*HAI*”) and Anders Lux Holdings S.à r.l. (“*Lux Holdco*”) (together, the “*Scheme Companies*”). HAI is incorporated in Sweden and Lux Holdco is incorporated in Luxembourg.
2. HAI is party to a Senior Facilities Agreement (the “*SFA*”) with a number of commercial lenders. The SFA was in fact the subject of a recent restructuring in 2022, but this has not achieved the desired result of stabilising the Group and further action is needed.
3. The current position under the SFA is that HAI is the borrower under a term loan with a principal amount of approximately €300 million (the “*Term Loan*”). The maturity date, which was extended under the 2022 restructuring, is now 28 February 2026. A number of other companies within the Group are also obligors. At the present time, approximately €302.1 million (including principal and accrued interest as at 9 June 2023) is owing under the Term Loan. The Term Loan is secured over a number of assets, including the share capital of each of the obligors.
4. Also under the 2022 restructuring, certain lending commitments then outstanding under the SFA (totalling approximately €270 million) were exchanged for notes issued by Lux Holdco under a Notes Purchase Agreement (the “*NPA*”) with an initial principal amount of approximately €273 million (the “*Notes*”). Lux Holdco stands above HAI in the relevant corporate chain, and the effect is that the Notes are structurally subordinated to the Term Loan.
5. The Notes and the Term Loan are contractually “*stapled*”, which means that the creditors in respect of each are the same persons (or affiliates or related parties). Notwithstanding that, for the purposes of the present application, one has to look separately at the rights under (i) the SFA/Term Loan and (ii) the Notes. These are different, and so one is concerned with two sets of creditors, even though they are the same people wearing different hats, namely the creditors under the Term Loan (“*the SFA Scheme Creditors*”), and the holders of the Notes (“*the NPA Scheme Creditors*”). That said, where convenient below I will refer to the two groups collectively as the “*Scheme Creditors*”.
6. An Order is sought convening meetings of both the SFA Scheme Creditors and the NPA Scheme Creditors, for the purposes of considering and if thought fit approving two connected Schemes of Arrangement.

### Some Background

#### The AHG, the Lock-Up Agreement and the New Money Facility

7. As I have said, notwithstanding the efforts in 2022, financial pressures on the Group continued. The Group’s business model requires substantial liquidity: it has a target minimum operating headroom of €35 million to ensure that sufficient funds are available to each operating company. As early as November 2022, the Group’s

liquidity forecasts showed that its available cash would drop to less than €10 million by the first week of May 2023 and that the relevant obligors would not be able to pay the interest due under the SFA on 28 April 2023 (the “*April 2023 Interest Payment*”). This would result in an Event of Default under the SFA.

8. Against this background, in December 2022 the Group and its advisers began to engage with an *ad hoc* group of Scheme Creditors (the “*AHG*”). As part of these arrangements, the Scheme Companies agreed to pay certain professional fees incurred by the members of the AHG
9. On 6 April 2023, following negotiations, a lock-up agreement was executed by various members of the Group and the AHG (the “*Lock-Up Agreement*”). Among other matters, this had the immediate effect of granting a forbearance in respect of the April 2023 Interest Payment, such that no Event of Default has been triggered. It also set out the terms of a new restructuring transaction which the parties to the Lock-Up Agreement agreed to support (or at least not oppose). The present Schemes are intended to implement that new restructuring.
10. I should mention one other feature of the Lock-Up Agreement, which is that in order to encourage creditors to come on board, it included provision for those who acceded to it by 5pm London time on 19 May 2023 to be entitled to receive a fee equal to 0.25% of their existing commitments under the Term Loan and the Notes (the “*Lock-Up Early Bird Fee*”)
11. At the date of this Judgment, Scheme Creditors holding approximately 90% of the Term Loan and the Notes (by value) have acceded to the Lock-Up Agreement.
12. There is another critical point to mention. More money was urgently needed in order to improve the Group’s liquidity position. In light of that, and in accordance with the terms of the Lock-Up Agreement, the members of the AHG agreed to backstop (i.e. underwrite) an emergency liquidity facility to the Group with a principal amount of €20 million plus certain capitalised fees (the “*New Money Facility*”). The first tranche of the New Money Facility (being just over half of the New Money Facility) has now been drawn down.
13. Importantly, although the New Money Facility was initially supported by only some of the SFA Scheme Creditors, *all* such creditors have the right, but not the obligation, to participate in it *pro rata* to their existing lending commitments under the SFA at any time prior to 12 July 2023. That is the proposed date of the sanction hearing. An upfront fee is payable to each lender in an amount equal to 4% of that lender’s commitments under the New Money Facility. This fee will be capitalised and added to the principal.
14. The arrangements have certain other features I should flag, since they are relevant to the question of class composition:
  - i) The members of the AHG who originally agreed to underwrite the availability of the €20m under the New Money Facility are to be paid a fee – the “*backstop fee*” - for doing so. In short the members of the AHG will receive a *pro rata* share of a backstop fee equal to 4% of the total commitments under the New Money Facility.

- ii) Another feature is the so-called “*Turnover Deed*.” This is an arrangement entered into on 28 April 2023 between those SFA Scheme Creditors who by then had chosen to make funds available under the New Money Facility, and certain other SFA Creditors who had not. Its effect is that, in the event of an insolvency, those in the latter group have promised to make available to those in the former a proportion of their insolvency returns, in order to recognise the increased financial exposure of the former from which the latter will have benefited, though they did not wish to take on any additional exposure themselves.

### The Schemes and the Relevant Alternative

15. The purpose of the Schemes is to avoid an insolvent collapse of the Group. This is achieved by a number of steps designed to improve its liquidity position. The main steps proposed are as follows:
  - i) Elevation of the New Money Facility so it has a “*super senior*” ranking (such that it ranks ahead of the Term Loan). This involves making related amendments to the SFA, NPA and other contractual documents
  - ii) A debt-for-equity swap in respect of the Notes (such that the Notes are exchanged for 100% of the share capital of a new holding company of the Group – “*New TopCo*”), and the stapling the Term Loan to the shares of that new holding company.
  - iii) The Term Loan will remain in place. However, the SFA will be amended so that HAI can elect to capitalise any interest due under the SFA, subject to certain threshold conditions, so as to assist with the cashflow requirements of the Group.
16. As to the *relevant alternative* – i.e., the mostly likely outcome if the Schemes are not approved and sanctioned – the evidence is that the Scheme Companies and the other obligors in the Group are likely to enter into insolvent liquidation. That is essentially because the failure of the Schemes would result in the termination of the Lock-Up Agreement, and if that happens the obligors under the SFA would no longer benefit from any forbearance in respect of the April 2023 Interest Payment. As a result, there would be a continuing Event of Default (as defined in the SFA) under the SFA and acceleration would be liable to occur at any time.
17. The Scheme Companies have instructed Interpath Advisory (the successor to KPMG’s restructuring practice) to prepare an independent report on the likely returns to the Scheme Creditors in a liquidation scenario and in various other scenarios (the “*Interpath Report*”). According to the Interpath Report, the SFA Scheme Creditors would be likely to recover an amount in the range of 12.6% to 25% of the sums owing to them in a liquidation scenario (or between 15.4% and 27.4% after taking account of the sums under the New Money Facility), and the NPA Scheme Creditors would recover nothing.
18. In contrast, it is said that under the Scheme, the Group will continue as a going concern with an enterprise value of approximately €300 million (according to Interpath’s valuation), which is equal to nearly all of the principal and interest owing under the

Term Loan (€302.1 million as at 9 June 2023). The Group will be stabilised with better liquidity arrangements. The Term Loan will remain in place with the prospect of it being repaid in full in the future. The NPA Scheme Creditors (who as noted already are the same parties) will benefit from any future upturn in the Group's enterprise value by virtue of the debt-for-equity swap. In those circumstances, the Scheme Companies suggest the Schemes are clearly in the best interests of the Scheme Creditors.

## **The Present Application**

### Notice

19. Turning then to the matters relevant to the present application, a Practice Statement Letter was circulated on 25 April 2023. That is more than seven weeks prior to the present hearing. Moreover, the Schemes have been negotiated over a period of many months, and 90% of the Scheme Creditors (by value) have already acceded to the Lock-Up Agreement. Accordingly, I am satisfied that the Scheme Creditors have been given sufficient notice of the present hearing.

### Jurisdiction

20. The next matter for consideration is jurisdiction.
21. The question for today is only whether there is any obvious and insurmountable jurisdictional impediment: see Re Noble Group Ltd [2019] BCC 349 (convening judgment) at [76] per Snowden J. I think not.
22. The scheme jurisdiction under Part 26 Companies Act is exercisable (inter alia) where “*a compromise or arrangement*” is proposed between “*a company*” and its creditors.
23. Taking those two components in turn, I think it obvious that the proposals I have summarised above involve a “*compromise or arrangement*”, because what is proposed is a package of revised terms which will have the effect of modifying the Scheme Creditors' existing rights and where necessary replacing them with new ones. That seems to me to involve both a compromise and an arrangement.
24. As to the second requirement, the statutory jurisdiction is exercisable in relation to a “*company*” (s.895(1) CA), and that means a company “*liable to be wound up under the Insolvency Act 1986.*” That definition is broad enough to include (as here) an overseas company, because such a company is “*liable*” to be wound up as an unregistered company under Part V of the Insolvency Act. So the jurisdiction exists. Of course there are limits as to whether a jurisdiction of such apparently broad territorial scope should actually be exercised. As a convenient shorthand it is usually said that there must be a “*sufficient connection*” with England in order to justify it: see Re Drax Holdings [2004] 1 WLR 1049 at [29], per Lawrence Collins J. That will depend on the facts of each case. I can see here that there are grounds supporting the view that there is a “*sufficient connection*”, such as the fact that the SFA and the NPA are governed by English law and are subject to the exclusive jurisdiction of the English Court. But such matters are properly for consideration at the sanction hearing.

### Class Composition

25. The next question is class composition. Two Scheme meetings are proposed, of the SFA Scheme Creditors and the NPA Scheme Creditors respectively. Is that approach justified or are other creditor classes needed?
26. In short I think the proposed approach is justified. The basic legal test is well known. The critical point is that 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).
27. The starting point, it seems to me, is that leaving aside the various features I have described relating to the AHG, the Lock-Up Agreement and the New Money Facility, the SFA Scheme Creditors and the NPA Scheme Creditors are entirely homogenous groups, the members of each having the same rights vis-à-vis the corresponding Scheme Company both now and under the terms of the Schemes. Taking them in turn:
  - i) The SFA Scheme Creditors all have essentially the same existing rights against HAI. They are all senior secured creditors of HAI under a single facility (the Term Loan) with a single set of commercial terms. Likewise, they are all proposed to have essentially the same rights under the Scheme: their claims will be subordinated to the New Money Facility in the same way, and they will be subject to the same amendments.
  - ii) The NPA Scheme Creditors also have essentially the same existing rights against Lux Holdco. They are all subordinated creditors of Lux Holdco under a single series of debt securities (the Notes) with a single set of commercial terms. Likewise, they are all intended to have essentially the same rights under the Scheme: in short, their Notes will be exchanged for shares in New TopCo, and the shares will be allocated to them on a *pro rata* basis.
28. The possible points of distinction all relate in one way or another to the position of the AHG, to the terms of the Lock-Up Agreement, and to the features of the New Money Facility I have described above. Do any of these matters fracture either class? On examination, I think not. I can take the points briefly in turn.
29. *Professional Fees*: This is the arrangement to meet certain expenses of the AHG. It is a common feature of restructurings. It is not intended to confer any additional benefit or bounty on the relevant creditors, only to make sure that they are not out of pocket (Re Codere Finance 2 (UK) Ltd [2020] EWHC 2441 (Ch) at [68]-[69] and [101]-[104] per Falk J). In my judgment it does not fracture the class.
30. *Lock-Up Early Bird Fee*: This is the arrangement under which each Scheme Creditor who acceded to the Lock-Up Agreement by 5pm London time on 19 May 2023 will be entitled to receive a 0.25% fee. I do not consider that this feature has any effect on class composition. For one thing, all Scheme Creditors were given an equal right to obtain it. For another, the fee is set at a modest level. The choice for Scheme Creditors when they vote will be an election between (1) the outcome contemplated by the Schemes if implemented (a recalibrated set of rights offering at least the prospect of full recovery in the future), and (2) the estimated outcome in the relevant alternative (a projected

overall return, even taking account of the New Money Facility, of between 15.4% and 27.4%). Given the nature and scale of the difference between the two alternatives, I do not think a fee of 0.25% is likely to have any material impact on the risk analysis. In my opinion it will not prevent those who receive it and those who do not consulting together in their common interest.

31. *Backstop Fee*: This is the fee payable to those SCF Creditors who underwrote the New Money Facility – i.e., those who agreed to make the needed €20m available even if no-one else wanted to participate. By doing so they undertook an additional commercial risk and are entitled to be compensated for having done so. The evidence indicates that a 4% fee is in line with market rates, and in fact likely cheaper than funding from a third party. In any event, a 4% fee is small in comparison to the overall benefits of the Schemes: again, I do not think it likely to make any material difference, as between those who will get it and those who will not, in terms of the basic choice to be made between the potential benefits of the Schemes on the one hand and the potential risks of the relevant alternative on the other.
32. *The New Money Facility*: The short point here, it seems to me, is that although the New Money Facility might be thought to confer benefits on those SFA Creditors who choose to participate in it (super-senior status and an additional 4% fee), *all* SFA Creditors have the *right* to obtain those benefits, and that right will remain open to them until 12 July – the date of the sanction hearing. It is therefore very difficult to see how in this respect there could be any difference in the rights of the SFA Creditors at the time when they have to vote – i.e., at the Scheme Meetings. Even if some of them by then have still not elected to participate in the New Money Facility, they will still the same right to do so as those who have, and if they choose to will do so on the same basis as everyone else (*pro rata* to their existing lending commitments, and with a 4% up-front fee). That being so, I fail to see why the SFA Scheme Creditors should not be able to consult together in their common interest at the relevant Scheme Meeting.
33. *Turnover Deed*: This is the arrangement under which certain SFA Scheme Creditors, who at the time were *not* willing to participate in the New Money Facility, nonetheless committed to make available to those who *were* a proportion of their recoveries on any insolvency. I do not see that such an arrangement fractures the class. In short, I agree with the analysis adopted by Hildyard J in Re Apcoa Parking Holdings GmbH [2015] Bus LR 374 at [92]-[93]. It is not concerned with rights against either Scheme Company. Instead it is an arrangement between certain Scheme Creditors *inter-se*, involving a rebalancing of interests between them. But their rights against the Scheme Companies remain the same. Such rights are not affected by what is essentially a private arrangement for an *ex post facto* adjustment to take place between them in the event that their joint debtor becomes insolvent.

#### Other Matters

34. I have reviewed the draft Explanatory Statement which I consider to be adequate and in an appropriate form for the recipients, all of whom are commercial parties well able to analyse financial and legal information and form their own views about it. I am content with the proposed directions for the Scheme Meetings, subject to a minor point on timing raised with Mr Allison KC in submissions, which has now been addressed.

## **Conclusion**

35. I will make the Convening Order sought and give directions for the two proposed Scheme Meetings accordingly.