Neutral Citation Number: [2021] EWHC 304 (Ch)

Case No: CR-2020-004615

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

**IN THE MATTER OF GATEGROUP GUARANTEE LIMITED**
**AND IN THE MATTER OF THE COMPANIES ACT 2006**

7 Rolls Building
Fetter Lane
London EC4A 1L

Date: 17 February 2021

**Before** :

**MR JUSTICE ZACAROLI**

-

**Felicity Toube QC and Dr Riz Mokal** (instructed by **Clifford Chance LLP**) for the **Applicant Company**

Hearing dates: 3 & 4 February 2021
Supplemental submissions in writing: 7 & 10 February 2021

**APPROVED JUDGMENT**

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 11:30 pm on 17 February 2021.

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MR JUSTICE ZACAROLI

**Mr Justice Zacaroli:**

Introduction

1. On 11 February 2021 I ordered the convening of two meetings of creditors of gategroup Guarantee Limited (the "Plan Company") to consider and, if thought fit, to approve a restructuring plan (the "Plan") under section 901C of the Companies Act 2006 (the "2006 Act").

2. This is my judgment explaining the decision to make that order.

3. The Plan Company was incorporated on 8 December 2020 as a wholly owned subsidiary of gategroup Holding AG (the "Parent"), a company incorporated in Switzerland.

4. The Parent is the sole owner of gategroup Finance (Luxembourg) SA (the "Issuer") and of gategroup Financial Services S.à.r.l. ("Luxco II"). Luxco II owns Gate Gourmet Luxembourg IV S.à.r.l., which in turn owns over 200 operating subsidiaries throughout the world.

5. The group comprising the Parent and its subsidiaries (the "Group") is the world's largest provider of airline catering services. In 2019, the Group served over 700 million passengers, providing catering for more than 5 million flights. As a result of the Covid-19 pandemic worldwide flights and passenger numbers have reduced dramatically, precipitating a massive decline in the Group's business. In the period from 1 January 2020 to 30 September 2020 the number of flights and the number of meals served by the Group were down approximately 62% and 69% respectively.

6. This has led to the Group encountering serious financial difficulties, made worse by continuing restrictions on international travel. I address these in more detail below but, in short, without further funding (which will not be forthcoming in the absence of the approval of the Plan) the Group will run out of cash in April or May this year.

7. The Group is nevertheless confident that it retains a strong core business so that, if it can survive the global pandemic, as and when flight and passenger numbers increase it will be able to continue as a viable going concern.

8. The Plan is one part of a wider proposed restructuring (the "Restructuring") to address the problems created by the pandemic.

The debt structure of the Group

9. The Group has three principal financing arrangements:

(1) A senior facilities agreement originally dated 20 October 2015 (the "SFA") entered into by Luxco II and two of its indirect subsidiary companies, relating to (i) a EUR350 million revolving facility and a EUR250 million term loan facility (the "Senior Loans"). The Loans are due to mature on 20 October 2021. The lenders under the Senior Loans (the "Senior Lenders") are financial institutions. The Senior Loans are

guaranteed by the Parent and 20 of its subsidiaries. The SFA is governed by English law and has an exclusive jurisdiction clause in favour of the courts of England.

(2) CHF350 million bonds (the "Bonds") issued by the Issuer on 28 February 2017 with a maturity date of 28 February 2022. The Bonds are guaranteed by the Parent alone. They are governed by Swiss law and contain an exclusive jurisdiction clause in favour of the courts of Zurich. The Bonds are listed on the SIX Swiss Exchange. They are represented by a permanent global certificate held by an intermediary. Financial institutions ("Participants") hold accounts with the intermediary. In turn the ultimate bondholders (the "Bondholders") hold the Bonds in a securities account with a Participant. The Bonds are held in denominations of CHF5,000. The identity of the Bondholders is not generally known to the Issuer. They are believed to be held predominantly by retail investors.

(3) An Interim Liquidity Facility dated 25 November 2020 (the "ILF"), due to mature on 25 May 2021. The lenders are Zeppelin Assets Holding Limited and Esta Investments Pte Ltd (the "New Money Lenders"), entities owned by the ultimate shareholders of the Group (the "Shareholders"). The borrower is the Parent. The ILF was entered into in order to provide the Group with liquidity in anticipation of the Restructuring. It was conditional upon the entry into the Lock-up Agreement described below.

10. In addition, and outside the Group structure, Holdco is the borrower under a EUR475 million term facility agreement dated 30 March 2019 (the "Mezzanine Facility Agreement"). This facility is due to mature on 3 April 2021.

11. By an intercreditor agreement dated 25 November 2020, the Senior Lenders subordinated their claims under the SFA to the claims of the New Money Lenders under the ILF.

<u>The Restructuring</u>

12. The Plan relates only to the SFA and the Bonds. These form part of a wider restructuring, comprising the following elements:

(1) The Shareholders have agreed to provide additional funding in the sum of CHF500 million, as to CHF25 million by way of subscription for new shares in the Parent and as to CHF475 million by way of an unsecured, subordinated convertible loan to the Parent. This funding is made available solely on the following basis:

(a) all of the Group's key financial stakeholders should make compromises;

(b) the Group is given sufficient time to stabilise its business and to recover, along with the rest of the aviation business, from the pandemic; and

(c) the Shareholders' additional liquidity should be used, first to repay the ILF, and otherwise only to fund the Group's general working capital and other business funding requirements (and none of it should be used to repay existing indebtedness other than the ILF).

(2) The maturity date under each of the SFA, the Bonds and the Mezzanine Facility Agreement is to be extended by five years (to October 2026, February 2027 and April 2026 respectively).

(3) The Mezzanine Facility Agreement will be amended to apply a minimum liquidity covenant of EUR25 million to the Group and to capitalise all interest.

(4) Certain other amendments will be made to SFA and the Bonds under the Plan (to which I refer in more detail below).

13. All elements of the Restructuring are inter-conditional. The arrangement with the Mezzanine Lenders is to be effected by a bi-lateral agreement.

14. The Group engaged in negotiations with the Senior Lenders, the lenders under the Mezzanine Facility Agreement and the New Money Lenders. As a result, on 25 November 2020 a lock-up agreement (the "Lock-up Agreement") was entered into between those lenders (including <u>all</u> of the Senior Lenders), the Parent and Holdco.

15. There are no consent fees or similar payments payable under the Lock-up Agreement, although the Parent has agreed to pay the reasonable costs and expenses (including legal fees) of the Senior Lenders relating to the Lock-up Agreement and the Restructuring.

<u>The incorporation of the Company and the Deed Poll</u>

16. Pursuant to their terms, the Bonds can only be amended at a Bondholders' meeting attended by Bondholders collectively holding at least 66% of the aggregate principal outstanding amount, by a resolution passed by at least 66% of the votes cast.

17. The Group considers that, in view of the large number of Bondholders each holding relatively small amounts, the quorum requirement under the terms of the Bonds makes it practically impossible to effect an amendment pursuant to those terms.

18. The Group has taken steps to move the centre of main interests ("COMI") of the Issuer to England. Such a COMI shift is sometimes relied upon to establish a sufficient connection with this jurisdiction for the purposes of

enabling a scheme of arrangement to be sanctioned. That is not the case here, however. It is not a necessary part of the Plan Company's application to convene a meeting of Plan Creditors that the Issuer's COMI has been moved to England. It is relevant to the enforceability of the Plan abroad (for reasons I explain later), but that is a matter to be considered at the sanction hearing if I were to order a meeting or meetings to be convened, and those meetings approve the Plan.

19. The Issuer has not itself proposed a Part 26A plan because that would have constituted an event of default under condition 7(d) of the terms of the Bonds, leading to potential acceleration and enforcement action. While it might have been possible to mitigate the effect of that by applying for a moratorium under Part A1 of the Insolvency Act 1986, I was told that this would not have prevented cross-defaults occurring under contracts entered into by other Group entities, thus imperilling the Restructuring as a whole.

20. To address the quorum difficulty under the Bonds, the Group caused the Plan Company to be incorporated on 8 December 2020. On 10 December 2020 the Plan Company then executed a deed of indemnity and contribution (the "Deed Poll"). By clause 2 of the Deed Poll the Plan Company agreed as primary obligor to indemnify:

(1) Each "Senior Facilities Finance Party" (including, materially, the Senior Lenders) in respect of all sums from time to time to time due and payable by a "Senior Facilities Obligor" (being the borrowers under the SFA and the guarantors in respect of it); and

(2) Each "Bond Finance Party" (including, materially, the Bondholders) in respect of all sums from time to time due and payable by a "Bond Obligor" (meaning the Issuer, and the Parent as guarantor of the Bonds).

21. By clause 3 of the Deed Poll (as amended), if any Senior Facilities Obligor or any Bond Obligor becomes obliged to make payment in respect of, respectively, the SFA or the Bonds, then the Plan Company agreed to pay that Obligor by way of contribution such amount as the relevant Obligor determines, up to the full amount to which the Obligor is required to pay.

22. The Plan Company has, and will always have, no assets. Accordingly, it has no means of satisfying the obligations imposed on it by the Deed Poll. To get around this, by a separate "Contribution Payment Agreement", whenever it is required to make a payment under clause 3 of the Deed Poll the amount will be funded by a payment from either the Bond Obligors (in the case of obligations under the Bonds) or the Senior Facilities Obligors (in the case of obligations under the SFA).

23. Under the Deed Poll as at the date of the hearing, all liabilities and obligations of the Plan Company under it would have been irrevocably and unconditionally cancelled and released with effect from the "Termination Date", defined as, among other things, the date on which the Court finally determines to refuse the Plan Company's application for an order to convene a meeting of creditors or to refuse the Plan Company's application to sanction

the Plan. Under the Contribution Payment Agreement as at the date of the hearing, it would have terminated on the same Termination Date.

24. After I had indicated to the Plan Company that I proposed to make an order convening meetings of two classes of creditors, I received a further note from counsel indicating that the Plan Company had instructed its legal team to amend the terms of the Deed Poll and the Contribution Payment Agreement. I received a copy of the amended Deed Poll shortly before making the order convening meetings of creditors. Under the amended Deed Poll, the Termination Date is now defined solely as 28 August 2027.

The Plan

25. The Plan itself is relatively simple. Its substantive effect is to extend the maturity of each of the SFA and the Bonds by five years and to make certain other amendments to each. This involves the following steps.

26. Under Step 1, the Plan Company (acting for itself and as agent of each of the Senior Lenders) will execute an amended SFA and a new intercreditor agreement. The amendments to the SFA will, in substance, be as follows:

(1) The maturity date will be extended to 20 October 2026;

(2) A minimum liquidity covenant of EUR25 million will apply in respect of the Group;

(3) An option will be included for the relevant borrower to capitalise any interest payable, if on any interest payment date the Group's EBITDA for the 12-month testing period ending immediately prior to that date is equal to or less than CHF440 million;

(4) Ring-fencing provisions which could restrict the Group from entering into transactions with Shareholder or their affiliates will be deleted.

27. Step 2 requires the satisfaction of various restructuring conditions.

28. Under Step 3, the terms of the Bonds will be automatically amended. In substance, those amendments will be as follows:

(1) The maturity date will be extended to 28 February 2027;

(2) Any right of the Bondholders to require their Bonds to be redeemed or repurchased prior to their maturity date as a result of Temasek Holdings Pte Limited, one of the Group's ultimate shareholders, or its affiliates, acquiring more than 50% of the shares in the parent shall be waived.

29. Aside from the above changes, and certain other technical amendments to the SFA, the terms of the SFA and the Bonds will remain the same. Importantly, the interest rates payable under each will be unaffected. The interest rates under the SFA are fixed by reference to EURIBOR plus a margin which varies depending upon the ratio of Net Debt to EBITDA of the Group. Accordingly:

(1) The interest rate under the revolving credit facility will initially be EURIBOR + 3.45% (based upon an initial Net Debt to EBITDA ratio of 3 to 1, reducing to a margin of 1.70% when the ratio is less than 1.5 to 1);

(2) The interest rate under the senior term loan will initially be EUROBOR + 3.90% (reducing to a margin of 2.15% when the Net Debt to EBITDA ratio is less than 1.5 to 1); and

(3) The interest rate under the Bonds is fixed at 3%.

The financial position of the Group

30. I have been provided with extensive evidence as to the likely outcome for the Group and for the Plan Creditors in the event that the Plan is not approved. I am satisfied that this demonstrates that the relevant companies in the Group will have no real alternative to entering a formal liquidating insolvency process.

31. A detailed analysis of the likely outcome in the event that the Plan is not approved is contained in a report from AlixPartners Ltd. This indicates the following likely recovery for Plan Creditors, on the basis of a range (from low to high case) of assumptions:

(1) Senior Lenders would be likely to recover between 6.3% and 19.2% of their debts;

(2) Bondholders would be likely to recover between 2.6% and 5.7% of their debts.

32. In the event that it was possible to achieve a sale of the Group's assets on an accelerated timescale, then the range of outcomes would be significantly improved:

(1) Senior Lenders would be likely to recover between 27.3% and 56.2% of their debts; and

(2) Bondholders would be likely to recover between 7.9% and 13.1% of their debts.

33. There are, however, formidable obstacles in the way of a sale of the Group's assets, including the need for significant funding, such that this is not considered to be a realistic alternative.

34. In contrast, if the Plan is approved, while there can be no certainty as to future events, all Plan Creditors have the real possibility, at least, of being able to recover in full over time.

The legal framework

35. Section 901C is within the new Part 26A of the 2006 Act, implemented by the Corporate Governance and Insolvency Act 2020 ("CIGA 2020").

36. As explained by Trower J in *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), at [17] to [18], the new procedure under Part 26A is intended to draw on the practice and principles applied by the court in sanctioning schemes of arrangement under Part 26 of the 2006 Act. For simplicity I will refer to a compromise or arrangement under Part 26 as a "scheme" and a compromise or arrangement under Part 26A as a "plan".

37. In particular, the language of section 901C (which enables the court to order a meeting of creditors or class of creditors, or members or class of members) and the language of section 901F (which enables the court to sanction a plan if a number representing 75% in value of creditors, or class of creditors, or members, or class of members, approve it) closely reflects the language of sections 895 and 899 of the 2006 Act relating to schemes.

38. There are, however, important differences between the two procedures. The differences of particular relevance in this case are as follows:

(1) Under Part 26, the court may sanction a scheme only if both (i) a majority in number (ii) representing 75% by value of the creditors or class of creditors (or members) approve the scheme. In contrast, under Part 26A there is no numerosity requirement: a plan may be sanctioned under section 901F provided that creditors (or members) representing 75% by value of the creditors or class of creditors (or members) approve it.

(2) Part 26 applies irrespective of the financial state of the company. By section 901A, however, Part 26A applies only if the following two conditions are satisfied:

> <u>Threshold Condition A</u>: "the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern"; and
>
> <u>Threshold Condition B</u>: "the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in [Threshold Condition A]"

(3) Under Part 26A, by section 901C(3), "every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned under subsection (1)" but, by section 901C(4), that does not apply "in relation to a class of creditors or members of the company if, on an application under the subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company". There is no similar statutory provision under Part 26, although there is a principle developed at common law which permits a company to leave out of a scheme those creditors who have no possible economic interest in the company: see *Re Tea Corp* [1904] 1 Ch 12.

(4) Under Part 26, a scheme consisting of more than one class of creditors (or members) may only be sanctioned if each of the classes approves the scheme by the requisite majorities. Under Part 26A, in contrast, section 901G provides that where two conditions ("Sanction Conditions") are met, then the court may sanction the plan even if one or more classes fail to approve the plan by the requisite majority (a "cross-class cram-down"). The conditions are as follows:

Sanction Condition A: "the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative".

(The "relevant alternative" is defined as "…whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F").

Sanction Condition B: "the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

39. The procedure to be followed (both in relation to a scheme and a plan) is set out in the practice statement dated 26 June 2020 (the "Practice Statement"). At the hearing for a direction to convene a meeting or meetings, paragraph 6 of the Practice Statement requires the applicant to draw to the attention of the court:

> "(a) any issues which may arise as to the constitution of meetings of members or creditors or which otherwise affect the conduct of those meetings;
>
> (b) any issues as to the existence of the court's jurisdiction to sanction the scheme;
>
> (c) (in relation to a Part 26A scheme) any issues relevant to the conditions to be satisfied pursuant to section 901A of the 2006 Act and, if an application under section 901C(4) of the 2006 Act is to be made, any issues relevant to that application; and
>
> (d) any other issue not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme."

40. By paragraph 10 of the Practice Statement, the court may reconsider any of the issues referred to in paragraph 6 at the hearing of the application to sanction the scheme. The court will in practice, however, require good reason to be shown before it does so: see *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch), per Snowden J at [44] (in relation to a scheme); and see *Re*

*DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch), per Trower J at [30] (in relation to a plan).

41. By paragraph 7 of the Practice Statement the applicant is obliged, unless there are good reasons for not doing so, to take all steps reasonably open to it to notify any person affected by the scheme of a number of matters, including the purpose which the scheme or plan is designed to achieve, the composition of the proposed meetings and the matters identified in paragraph 6 of the Practice Statement (see above).

42. Accordingly, the following matters fall to be considered at this convening hearing:

(1) Adequacy of notice of the convening hearing to plan creditors;

(2) Jurisdictional requirements;

(3) Threshold Conditions A and B;

(4) Class composition;

(5) Any other issues not going to merits or fairness which might cause the court to refuse to sanction the restructuring plans; and

(6) Practical issues regarding the adequacy of notice, documentation and proposals for the meetings of creditors.

<u>(1) Adequacy of notice</u>

43. Since 100% of the Senior Lenders have signed the Lock-up Agreement, the question whether adequate notice has been provided applies in practice only to the Bondholders.

44. The Plan Company sent a letter dated 11 December 2020 (the "Practice Statement Letter") to Bondholders, electronically via the "Principal Paying Agent" as defined in the Bonds. This is the normal method for sending communications relating to the Bonds to the Bondholders. In addition, a notice was published on the website of the SIX Swiss Exchange where the Bonds are listed, informing Bondholders that they could receive a copy of the Practice Statement Letter from the Information Agent or via a Plan portal, once they had registered on the Plan website. Public notice was also given by uploading an announcement to the media centre of the Group's website.

45. The convening hearing was originally listed for 15 January 2021. On 5 January 2021, an investor holding approximately 10% of the Bonds, Hestia Investments Designated Activity Company ("Hestia") contacted the Plan Company's solicitors expressing concern at the lack of information concerning the Plan, including notably the fact that they did not have access to the Deed Poll which was said to constitute the Plan Company their debtor.

46. The Plan Company contended that it was unable to provide such information (which was not yet in the public domain) due to the requirement under Swiss law to treat all Bondholders equally.

47. In the event, Hestia served a 70-page skeleton argument identifying numerous grounds for opposing the Plan.

48. Prior to 15 January 2021, when the application was listed to be heard before Trower J, it became apparent that there was insufficient time to accommodate the convening hearing. Accordingly, it was adjourned, with a direction that it be re-listed with a time estimate of two days and directions for documents to be provided to Hestia.

49. In view of the lengthy period of time that has passed since the Practice Statement Letter was first made available to Plan Creditors some two months ago (even assuming that it may have taken some days to filter through the system) I am satisfied that adequate notice of this convening hearing has been provided to them.

50. Two days before the adjourned hearing date, Hestia withdrew its opposition. It was not represented at the hearing. I was assured that no deal had been made with Hestia, other than an agreement to pay its legal fees incurred in mounting its opposition to the application.

51. The Plan Company's application has therefore been effectively unopposed, although I have had the benefit of the detailed skeleton argument filed by Hestia, to which I will make reference throughout the course of this judgment.

<u>(2) Jurisdictional requirements</u>

52. The Plan Company is incorporated in England and Wales. It is accordingly liable to be wound up under the Insolvency Act 1986 and is therefore a company to which Part 26A applies: see section 901A(4)(b) of the 2006 Act.

53. The more difficult question is whether this court has jurisdiction under the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, signed in Lugano on 30 October 2007 (the "Lugano Convention").

54. As of 1 January 2021 the UK is no longer a party to the Lugano Convention. The claim form in this case was issued, however, on 30 December 2020. As such, by reason of Regulation 92(1), (2)(d) and (3) of the Civil Jurisdiction and Judgment (Amendment) (EU Exit) Regulations 2019, the Lugano Convention continues to apply.

55. If the Lugano Convention applies to applications under Part 26A, then the Plan Company accepts that by reason of Article 23(1) of the Convention and the exclusive jurisdiction clause in favour of the courts of Zurich in the Bonds, this court has no jurisdiction. That acceptance is made notwithstanding that the Deed Poll contains a non-exclusive jurisdiction clause in favour of the courts of England. The Plan Company acknowledges that since the purpose of

the Plan is to effect amendments to the terms of the Bonds, the exclusive jurisdiction clause in the Bonds is engaged.

56. The Plan Company contends that the Lugano Convention has no application to a claim under Part 26A because it is not a "civil and commercial matter" as it falls within the bankruptcy exception in Article 1(2)(b):

> "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."

It is accepted that, but for the bankruptcy exclusion, the proceedings would be a civil or commercial matter.

57. Hestia, before it withdrew its opposition, contended as follows:

(1) The relevant provisions of the Lugano Convention are materially identical to those in EU Regulation 1215/2012, the Recast Brussels Regulation (the "RBR") and should be construed consistently in both instruments;

(2) A scheme under Part 26 is a civil and commercial matter within the RBR, and does not fall within the equivalent bankruptcy exception;

(3) A plan under Part 26A should be considered, for this purpose, to be materially the same as a scheme under Part 26, so similarly does not fall within the bankruptcy exception.

58. The Plan Company agrees with the first two of those propositions, but disputes the third.

59. In order to address this question, it is first necessary to understand why it is considered that the RBR applies to schemes under Part 26.

60. In its skeleton argument, Hestia pointed to the following:

(1) It has long been established that the RBR (and its predecessor, the Judgments Regulation No 44/2001) should be construed so as to dovetail with the EU Insolvency Regulation (EU 1346/2000 and, in recast form, EU 2015/848) (the "Insolvency Regulation"): see *Comité d'entreprise de Nortel Networks SA v Rogeau* [2015] BCC 490 at [23]:

> "It is settled case law that Regulation No 1346/2000 and Regulation No 44/2001 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded, under article 1(2)(b) of Regulation No 44/2001, from the scope of that Regulation in so far as they come under "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of article

> 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001: see *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* (Case C-213/10) [2013] Bus LR 232, paras 21, 29 and 48 and *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* (Case C-157/13) [2015] QB 96, para 22."

(2) The Insolvency Regulation sets out those proceedings to which it applies in each Member State at Annex A. Neither schemes under Part 26 nor plans under Part 26A are within Annex A.

(3) According to the dovetailing principle, therefore, as schemes and plans are not within the Insolvency Regulation they must fall within the RBR and, since it must be construed in the same way, the Lugano Convention.

61. Hestia also pointed to English authorities which have considered the application of the RBR to schemes under Part 26.

62. In two early cases, *Re La Mutuelles du Mans Assurances IARD* [2006] BCC 11 (Pumfrey J) and *Re DAP Holding NV* [2006] BCC 48 (Lewison J) it was held that the precursor to the RBR had no application to schemes of arrangement. In the latter case, Lewison J said (at [14]):

> "Article 1(2)(b) of that Regulation excludes from its scope bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. Since judicial arrangements are expressly excluded from the scope of that Regulation, it seems to me to be clear that the court should not, through arguments based on the hypothesis that a company may be liable to be wound up when solvent, permit that clear exclusion to be displaced by some sort of implied exclusion. I consider, therefore, that the sanction of a scheme under sections 425 and 426 of the Companies Act is expressly excluded from the scope of the Judgments Regulation."

63. In *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), Briggs J took a different view in the case of a scheme relating to a *solvent* company. He found three difficulties with the conclusions of Lewison J and Pumfrey J. The first was the dovetailing principle, which he referred to as "the plan that the bankruptcy exclusion should exclude from the Judgments Regulation nothing more, and nothing less, than what was included within the scope of the Insolvency Regulation." Second, he noted that if schemes were excluded from the Judgments Regulation, then they were not capable of being recognised pursuant to that Regulation. Third, he relied on expert evidence to the effect that the German language version of the Judgments Regulation excluded only such judicial arrangements, compositions or analogous proceedings as arise in a bankruptcy or insolvency context.

64. Briggs J was invited to conclude that schemes in relation to an insolvent company (save where they were made within the context of insolvency proceedings) are also excluded from the Judgments Regulation, but that was not a matter on which he needed to reach a decision.

65. That question arose in *Re Magyar Telecom BV* [2014] EWHC 3800 (Ch), in which David Richards J concluded that a scheme of arrangement in relation to an insolvent company (certainly one which was not already subject to formal insolvency proceedings) was within the scope of the Judgments Regulation. At [29] he said:

> "As schemes of arrangements are not insolvency proceedings falling within the Insolvency Regulation and as it is generally accepted that the purpose of art.1(2)(b) is to enable the Judgments Regulation and the Insolvency Regulation to dovetail almost completely with each other (see the Schlosser Report cited by Briggs J. at [47]), it logically follows that the exclusion in art.1(2)(b) does not extend to a scheme of arrangement involving an insolvent company, at least unless the company is the subject of an insolvency proceeding falling within the Insolvency Regulation."

66. In many subsequent cases, the court has adopted the pragmatic course of assuming that the RBR applies because even if it did, and even if scheme creditors are to be regarded as being "sued" by virtue of an application to sanction a scheme, the English court nevertheless had jurisdiction under the terms of the RBR either because of a jurisdiction clause in favour of the English court or because at least one creditor was domiciled in this jurisdiction.

67. Hestia referred me to the same approach being taken by the court in each of the cases concerning restructuring plans under Part 26A to date:

(1) In *Virgin Atlantic Airways Ltd* (above), Trower J said at [57] to [61]: "It is now well-established that an application for sanction of a Pt 26 scheme is a civil or commercial matter and the reasoning seems to me to apply with equal force". He went on to note that there was some uncertainty whether Article 4(1) (which required a person domiciled in an EU state to be sued in the courts of that Member State) applied to a scheme, but adopted the usual practice of assuming without deciding that it did.

(2) In *Re Pizza Express Financing 2 plc* [2020] EWHC 2873 (Ch), Sir Alastair Norris adopted, at [29] "…the established conventional approach in the context of schemes of assuming that the Recast Judgments Regulation does indeed apply to restructuring plans for the purpose of allocating jurisdiction within the EU but that Article 8 is engaged";

(3) In *Re DeepOcean 1 UK Ltd* (above), at [36] to [38], Trower J again expressed the view that an application for the sanction of a plan under Part 26A is, like an application to sanction a scheme under Part 26, a civil or commercial matter.

68. In none of these cases, however, did the point need to be decided, since jurisdiction could be established under one or other of the provisions of the RBR. Moreover, in none of them was there adversarial argument on the point.

69. In this case, in contrast, the point needs to be decided because the Plan Company accepts that the exclusive jurisdiction clause in favour of the Zurich courts is a complete bar to this court assuming jurisdiction if the Lugano Convention applies.

70. Late on Friday 5 February 2021, the day after the conclusion of the hearing, I received an unsolicited letter from Kirkland & Ellis ("K&E), a law firm with extensive experience in this area. Although K&E had written to the Plan Company at an earlier stage in the process indicating that it had been approached by financial investors interested in forming an *ad hoc* group of Bondholders, nothing came of that. In their letter, K&E acknowledged therefore that they had no interest in the Plan and were neutral so far as the application in respect of the Plan is concerned. They nevertheless wished the court to know that they were "firmly of the view that the restructuring plan procedure is *not* an insolvency proceeding" and that they consider it would be "extremely unhelpful for the court to decide that a restructuring plan is an insolvency proceeding for the purposes of the Lugano Convention." The K&E letter set out extensive argument in support of that position.

71. It is a feature of most schemes and plans that the court is required to reach a determination on matters such as jurisdiction without the benefit of full adversarial argument on the point. Particularly where a case raises matters of potentially wide application, if there is someone willing to fund attendance before the court in order to present opposing views, as a form of *amicus*, then there may be good reason for the court to agree to that course. It is not particularly helpful, however (and the practice is strongly discouraged), to receive correspondence from third parties after the hearing, when there is no opportunity for it to be tested by the usual back-and-forth that is a valuable feature of the court process. Although the letter was marked "private and confidential", any confidentiality was removed in sending it to the court. Both it, and the response to it to which I refer below, are public documents having been read by the court and referred to in this judgment.

72. The letter having been forwarded at the court's instigation to the Plan Company's solicitors and counsel, I received a full response to it from counsel, prepared over the course of the weekend. I am grateful to them for the speedy response, particularly in light of the time pressure for a decision to be reached in view of the perilous financial state of the Group. I note that through a combination of Hestia's skeleton argument and counsel's submissions during the hearing, the points raised by K&E had to a large extent already been addressed in the hearing.

*The exclusion of Part 26A from Annex A to the Insolvency Regulation*

73. The first point to address is the short point raised in Hestia's skeleton argument, that because Part 26A is not listed in Annex A to the Insolvency Regulation, it is conclusively not an insolvency proceeding and "that is the

end of the matter" because the dovetailing principle leads inexorably to the conclusion that it falls within the RBR (and thus within the Lugano Convention). I will refer to this as the narrow form of the dovetailing principle.

74. The Plan Company's response to this is equally short: since Part 26A was enacted only after the UK ceased to be an EU Member State, there would have been no possibility of Part 26A being added to Annex A, and in any event no purpose in seeking to do so. Accordingly, the absence of Part 26A from Annex A has no probative value and the dovetailing principle, in its narrow form at least, can have no application.

75. It is true that, while Article 1(1) defines the scope of the Insolvency Regulation by reference to substantive requirements, it states that the proceedings referred to in that paragraph "are listed in Annex A". Moreover, Recital 9 indicates that the purpose of this is to ensure that inclusion, or exclusion, of a proceeding in a Member State from Annex A is conclusive as to whether it is within, or outside, the scope of the Insolvency Regulation. It states that the Regulation applies to insolvency proceedings which meet the conditions set out in it, and that these are "listed exhaustively in Annex A" and that:

> "In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation."

76. It is debatable whether the question whether proceedings, which on the face of it are insolvency proceedings, are excluded from the RBR is to be answered on the same simple basis, i.e. by reference solely to whether they are listed in Annex A as opposed to by reference to whether they comply with the requirements of Article 1(1). I note that it is up to a Member State to choose to submit its domestic insolvency proceedings for inclusion within Annex A.

77. Recital 7 states in terms that the interpretation of the Insolvency Regulation should "as much as possible" avoid regulatory loopholes between it and the RBR and goes on to state:

> "the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by [the RBR]".

78. This wording did not appear in the original version of the Insolvency Regulation (which was the relevant Regulation at the time of *Rodenstock* and *Magyar Telecom*). The Recast Insolvency Regulation was in force at the time of the later decision of the Court of Appeal in *Tchenguiz v Grant Thornton UK llp* [2018] QB 695, in which the dovetailing principle was affirmed, but reference was made only to the original version of the Regulation: see per Briggs LJ at [12].

79. There is also bound to be a time-lag between introduction of a new proceeding in a Member State, and the acceptance by the Commission of that Member State's submission for the proceeding to be listed in Annex A. For example, insolvency proceedings in Croatia, which were ultimately accepted as falling within Article 1(1), were notified to the Commission on 3 January 2017. These were only listed in Annex A by EU Regulation 2018/946 on 4 July 2018, along with new proceedings that had been introduced into domestic law in four other Member States on various dates in the meantime. In relation to each of them, the Commission determined that they complied with the requirements of Article 1(1), which made it necessary for Annex A to be amended. A further pertinent example, as I explain below, is a recent Dutch law in materially similar terms to Part 26A, enacted in October 2020 and awaiting inclusion via an amendment to Annex A.

80. It is unlikely that the bankruptcy exclusion in the RBR is to be construed as encompassing the relevant insolvency proceedings as from 4 July 2018 upon the making of Regulation 2018/946, but not immediately prior to that date. As I note below at [88], the Jenard Report made it clear that the bankruptcy exclusion applied immediately to bankruptcy proceedings, notwithstanding that the convention that was designed specifically for them was not yet in force.

81. The narrow form of the dovetailing principle cannot, in any event apply in relation to the bankruptcy exclusion contained in the Lugano Convention to contracting parties that are not also a party to the Insolvency Regulation. Proceedings in such a country *cannot* be included in Annex A, so the bankruptcy exclusion in the Lugano Convention cannot be interpreted, so far as proceedings in those countries are concerned, as limited to proceedings that are listed in Annex A. Switzerland is one such country, and the UK is now another.

82. The Plan Company contends that this is true in relation to proceedings under Part 26A, because the UK was no longer a Member State when this was introduced. The point is made in the K&E letter that the UK was still a party to the Insolvency Regulation until 31 December 2020, so that it would have been possible for it notify the Commission of its intention to include Part 26A in Annex A before it ceased to be a party. As Regulation 2018/946 demonstrates, however, the process for inclusion of new proceedings in Annex A is via a separate Regulation enacting an amendment to Annex A. This is achieved under Article 81 of the Treaty of Rome. As from 1 February 2020, the UK ceased to be a Member State and so ceased to participate in EU decision-making processes.

83. Whether it would have been theoretically possible for the UK to submit the new procedure under Part 26A for inclusion within Annex A, and even assuming that the European Parliament and Commission could have enacted a Regulation so as to amend Annex A before 1 January 2021, there would have been no practical point in doing so.

84. In those circumstances, I accept the Plan Company's submission that the fact that part 26A is not listed in Annex A is of no probative value in considering whether it falls within the scope of the bankruptcy exclusion in the Lugano Convention. It is therefore necessary to approach the question from first principles.

85. The starting point is that this is a question of construction of the bankruptcy exclusion in the Lugano Convention. The phrase "judicial arrangements, compositions and analogous proceedings" is on its face clearly broad enough to encompass a plan under Part 26A. The wording nevertheless needs to be construed on an autonomous basis having regard to the relevant pre-legislative materials.

86. The official explanatory report on the Lugano Convention by Professor Fausto Pocar, at paragraph 10, states that where the language in the Lugano Convention is the same, or materially the same, as the language in a previous instrument, "it will be enough to refer back to the earlier explanatory reports", citing in particular the report dated 27 September 1968 on the Brussels Convention of 1968 (the "Jenard Report").

87. The bankruptcy exclusion in the Lugano Convention is identical to that contained in the 1968 Brussels Convention and in the RBR. The Jenard Report stated, under the heading "Bankruptcy":

> "Bankruptcy is also excluded from the scope of this Convention. A separate Convention is currently being drafted, since the peculiarities of this branch of the law require special rules.
>
> Article 1(2) excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, i.e. those proceedings which, depending on the system of law involved, are based on the suspension of payments, the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either of compulsory and collective liquidation of the assets or simply of supervision.
>
> Thus the convention will cover proceedings arising from schemes of arrangement out of court, since the latter depend on the intention of the parties and are of a purely contractual nature…
>
> Proceedings relating to a bankruptcy are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy and hence falling within the scope of the Bankruptcy Convention of the European Economic Community are excluded from the scope of the Convention."

88. At the time of the Jenard Report a European bankruptcy convention was under negotiation. No such convention ever came into being, but the same aim was achieved via the Insolvency Regulation. The bankruptcy exclusion was nevertheless intended to have immediate effect even though no bankruptcy convention was then in being: see the following further passage from the Jenard Report:

> "Pending the conclusion of the separate Convention covering bankruptcy, proceedings arising directly from bankruptcy will be governed by the legal rules currently in force, or by the conventions which already exist between certain Contracting States…"

89. The Jenard Report indicates that the underlying rationale for the bankruptcy exclusion was that the "peculiarities" of bankruptcy require special rules. That also underlay the need for a separate convention dealing with bankruptcy. This suggests two approaches to interpretation in a case where the relevant proceedings are in a country which is not a Member State for the purposes of the Insolvency Regulation. First, to identify what are the particular features of bankruptcy or, more accurately, insolvency proceedings which mean that they require special treatment and enquire whether the relevant proceedings contain the same features. Second, to consider whether the relevant proceedings would comply with the requirements of Article 1(1) of the Insolvency Regulation if the proceedings had been enacted in a Member State.

90. By way of preliminary point, the reference in the Jenard Report to "schemes of arrangement" being covered by the Brussels Convention is clearly not a reference to schemes under the English Companies Acts, since a scheme is not of a purely contractual nature: as Lord Hoffmann said in *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271 (PC), at 12, it is the statute which gives binding force to a scheme (in that case under Bermudian legislation equivalent to that relating to schemes of arrangement under the English Companies Acts) when there has been a combination of three acts: the company (or its liquidator) has proposed a scheme; the creditors have approved it by the requisite majority and the court has sanctioned it.

*The peculiarities of insolvency proceedings*

91. The principal "peculiarity" of insolvency proceedings which means that special rules relating to jurisdiction and recognition are required is that they are a collective process, driven by the need to solve the problem that the debtor's assets are insufficient to satisfy the claims of all of its creditors, thus raising at least the possibility of competition among the debtor's creditors and stakeholders. As Briggs LJ noted, in *Tchenguiz v Grant Thornton* (above), at [54]:

> "It is a normal (although not perhaps invariable) characteristic of insolvency proceedings that they are collective in nature, whereas it is a normal (but again not invariable) characteristic of civil and commercial proceedings within the scope of the

> Lugano Convention that they are brought by individuals or small groups, but not classes of creditor or stakeholder."

92. The collective nature of insolvency proceedings means that the approach to questions of jurisdiction and recognition is shaped by the principle of universalism, ("…a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets", per Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, at [6]), although in practice full universalism is not achievable, so the principle is modified to allow exceptions (for example, permitting secondary parallel proceedings in jurisdictions other than that of the debtor's domicile).

93. Modified universalism underpins the Insolvency Regulation, as Briggs LJ said in the *Tchenguiz* case (above) at [50], having noted that a unitary insolvency process best serves the objectives of insolvency law:

> "After an early but unsuccessful attempt to devise a harmonised insolvency law across all member states, independent from the different systems in existence in each, the framers of the Insolvency Regulation fastened upon the universal application of the lex concursus (the insolvency law of the home member state) as the only practicable means of achieving unity in cross-border insolvency."

94. See also Recital 23 of the Insolvency Regulation:

> "This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union."

95. Modified universalism also underpins the UNCITRAL Model Law on cross-border insolvency (the "Model Law"): see, for example, *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, per Henderson LJ at [31]. One of the aims of the Recast Insolvency Regulation was to bring it more in line with the approach taken in the Model Law: see paragraph 3.1.1 of the Commission's Proposal in respect of the Recast Insolvency Regulation, referring to its extension in scope to cover proceedings enabling a debtor to find an arrangement with creditors at a pre-insolvency stage.

96. The approach to jurisdiction and recognition in the Lugano Convention is incompatible with principles of modified universalism. Each of the Articles set out in sections 2 to 7 of Title II provides a basis or bases for assuming jurisdiction against a person by reference either to that person's place of domicile or the nature of the claim made against that particular person. There are special rules, for example, where the claim is in contract, or tort, or relates to insurance or consumer contracts, or employment.

97. If applied to an insolvency proceeding concerning a debtor with a cross-border business, these rules would inevitably routinely establish a multiplicity of jurisdictions because of the differing locations of creditors and the differing attributes of their claims.

98. It is true that the ability to rely upon an anchor defendant within the jurisdiction to join all other creditors, under Article 6(1) provides partial mitigation to this problem, but it does not answer the point that the rules on jurisdiction do not work in any practical sense given the special features of insolvency proceedings.

99. Article 23(1), relating to exclusive jurisdiction agreements, would give rise to the same problem (which, as this case shows, would not be cured by Article 6(1)), for example, where a company had entered into two or more financing arrangements such as bond issues, each containing an exclusive jurisdiction clause in favour of the courts of different countries.

100. In my judgment, proceedings designed to enable a company in financial difficulties to reach a composition or arrangement (to use the words in the bankruptcy exclusion) with its creditors involves the same peculiar feature as a straightforward bankruptcy or winding-up. The need for the composition or arrangement arises from the company's inability to satisfy the claims of all its creditors. There is inherently competition between the company's creditors, requiring a collective solution that is fair to all. As I have noted above, it is an unresolved issue in the scheme jurisdiction whether a creditor is to be treated as being "sued" by an application to sanction a scheme. In any event, rules which allocate jurisdiction by reference to the domicile of each creditor, or the legal nature of each creditor's claim, or by reference to bi-lateral contractual provisions with different creditors, are as inapposite and impractical in the context of Part 26A proceedings, which are premised on the financial difficulties of the company, as they are for traditional insolvency proceedings.

101. One of the arguments advanced by Hestia (and in the K&E letter) is that a Part 26A plan is materially indistinguishable from a scheme, so the conclusion reached in the authorities to date that a scheme is not within the bankruptcy exclusion in the RBR or Lugano Convention should apply equally to a plan.

102. I disagree. Threshold Conditions A and B make a significant difference. I consider in more detail below, in considering the scope of the Insolvency Regulation, the impact of the fact that the Threshold Conditions do not require the company to be actually insolvent. In the context of construing the bankruptcy exclusion in the Lugano Convention by reference to its purpose as I have identified above, however, I consider that Threshold Conditions A and

B are sufficient to position Part 26A within that purpose. It is the fact that the company has encountered, or is likely to encounter, financial difficulties that will or may affect its ability to carry on business as a going concern *and* the fact that any plan must be one that seeks to eliminate, reduce or prevent, or mitigate the effect of those financial difficulties which means that the potential for competition between creditors is engaged and requires a collective solution.

103. Accordingly, since the rationale for excluding bankruptcy proceedings as explained in the Jenard Report extends to proceedings under Part 26A, that is a strong indication that the bankruptcy exclusion should be construed so as to encompass those proceedings.

*Insolvency Proceedings within the Insolvency Regulation*

104. The second approach to construction is to enquire whether proceedings under Part 26A comply with the requirements of Article 1(1) of the Insolvency Regulation.

105. Article 1(1) of the Insolvency Regulation provides that it applies to "public collective proceedings" which are "based on laws relating to insolvency" and in which:

> "for the purpose of rescue, adjustment of debt, reorganisation or liquidation: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)."

106. Breaking this down, it contains the following elements:

(1) The proceedings must be collective proceedings;

(2) They must be based on laws relating to insolvency and have as their purpose rescue, adjustment of debt, reorganisation or liquidation; and

(3) They must encompass at least one of the following:

a. The debtor is partially or totally divested of its assets;

b. The assets and affairs of the debtor are subject to control or supervision by a court; or

c. A temporary stay is imposed, by a court or by operation of law, on individual enforcement proceedings to enable negotiations to take place between the debtor and its creditors.

107. Ms Toube QC, who appeared with Dr Mokal for the Plan Company, accepted that, of the matters in (3) above, only the second is relevant in this case (the assets and affairs of the debtor are subject to control or supervision by a court). Proceedings under Part 26A do not involve the divestment of a debtor's assets. Nor is there any stay on enforcement action in this case, although one could theoretically have been sought by the Plan Company under section A3 of the Insolvency Act 1986 (also introduced by CIGA 2020). In that event, the relevant proceeding encompassed by this part of Article 1(1) would be the moratorium proceeding.

108. I will address each of the elements in paragraph [106] above in turn.

*Collective Proceedings*

109. The Insolvency Regulation defines collective proceedings, at Article 2(1), as "proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them." This is to be interpreted in light of Recital 14, which states that collective proceedings to which the Regulation applies are:

> "those which affect at least a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected. Proceedings which involve only the financial creditors of a debtor should also be covered. Proceedings which do not include all the creditors of a debtor should be proceedings aimed at rescuing the debtor. Proceedings that lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets should include all the debtor's creditors."

110. I consider that a creditor plan under Part 26A satisfies the requirement for a collective proceeding. Although Threshold Condition B is to interpreted broadly so as to encompass a case where the plan's purpose is to mitigate the effect of the financial difficulties by providing a better return for creditors (see *Re DeepOcean* (above) at [48]), it undoubtedly encompasses a plan aimed at "rescuing the debtor". This is the type of proceeding which Recital 14 specifically envisages may be made with only some of the debtor's creditors. Schemes have commonly been used to restructure financial debt, and plans under part 26A are likely to be used for the same purpose. Recital 14 makes it clear that proceedings which include only financial creditors qualify as collective proceedings.

111. So far as the Plan in this case is concerned, it involves all of the Plan Company's financial creditors, indeed all of its creditors other than the Group entities that are its creditors by virtue of the contribution provisions in the Deed Poll.

*Laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation or liquidation of the debtor*

112. The phrase "Laws relating to insolvency" in Article 1(1) of the Insolvency Regulation must be understood in light of numerous references in the Regulation to its application in "pre-insolvency" cases, where there is only a likelihood of insolvency and where the relevant proceedings are aimed at preventing insolvency and ensuring the debtor continues as a going concern.

113. The words at the end of Article 1(1) make this extended meaning of "insolvency" clear: "Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities." The following recitals reinforce this:

i) Recital 10:

> "The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. <u>It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency</u>" (emphasis added)

ii) Recital 17:

> "This Regulation's scope should extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months or even longer in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it."

114. Support for this view is found in the Commission's proposal for the Recast Insolvency Regulation which, at paragraph 3.1, stated: "The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings…". Further, at paragraph 3.1.1, it is stated that "it is proposed to make an express reference to proceedings for the adjustment of debts and to the purpose of rescue in order to include also those proceedings which enable the debtor to find an arrangement with his creditors at a pre-insolvency stage."

115. In my judgment, the presence of the Threshold Conditions means that Part 26A is a law relating to insolvency for the purposes of the Insolvency Regulation. They require not only that there exist actual or potential financial difficulties which threaten the ability of the debtor to continue as a going concern, but also that the plan must address those financial difficulties. The purpose is clearly the avoidance of insolvency, a purpose covered by the Insolvency Regulation as made clear by the final words of Article 1(1). The fact that a Part 26A plan may only mitigate the effects of the company's financial difficulties (as noted in *DeepOcean* above) does not affect this conclusion: proceedings with that aim are insolvency proceedings without the need for the extended meaning introduced by the Recast Insolvency Regulation.

116. Ms Toube and Dr Mokal, in their written argument, sought to persuade me that these Threshold Conditions meant that a company could only promote a plan under Part 26A where its financial condition was such that the directors' duty to take account of the interests of creditors was engaged. That would be, according to the Court of Appeal's decision in *BTI 2014 LLC v Sequana S.A.* [2019] EWCA Civ 112, per David Richards LJ at [220], when the directors know or should know that the company is or is likely (in the sense of probable) to become insolvent. In support, they cited numerous provisions in the consultation papers, and the government's response to them, relating both to the provisions that became Part 26A and to other provisions which were enacted at the same time by CIGA 2020.

117. I consider it doubtful that Parliament intended to equate the test within Conditions A and B with the duty at common law to take account of the interests of creditors (preserved by section 172(3) of the 2006 Act). I do not, however, need to decide this point. I am satisfied merely by reference to the language of Part 26A, construed in its context, that it is a proceeding which satisfies the expanded definition of insolvency proceedings in the Insolvency Regulation.

118. Given that one of the purposes of the expanded meaning of insolvency proceedings under the Recast Insolvency Regulation is to enable companies to restructure their debt before they became insolvent and so as to avoid insolvency, I consider that it should include a company that is likely to face financial difficulties that may prevent it from carrying on business as a going concern, as much as one whose likely financial difficulties will prevent it from carrying on business as a going concern. A test which only applied where there was certainty that a company's financial difficulties would prevent it from carrying on business as a going concern would be almost impossible to satisfy.

119. The fact that these Threshold Conditions must be satisfied distinguishes Part 26A from part 26, particularly in light of Recital 16 of the Insolvency Regulation:

> "This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency."

120. Part 26 is not designed exclusively for insolvency situations, even given the expanded meaning of insolvency under the Regulation. Part 26A, however, is. Even though it encompasses arrangements with members, the Threshold Conditions nevertheless apply. The fact that Part 26A appears in the 2006 Act which, as a whole, is not designed exclusively for insolvency situations, is in my view irrelevant. What matters is the law which defines the relevant proceeding, and that is wholly contained in Part 26A.

121. So far as the related requirement that the purpose of the proceedings must be for one or other of "rescue, adjustment of debt, reorganisation or liquidation", this is satisfied in the case of Part 26A given the content of Threshold Condition B.

*Assets and affairs of the debtor are subject to control or supervision by a court*

122. Ms Toube submitted that this requirement is satisfied in the case of a Part 26A plan because of the court's involvement in the process. There is undoubtedly significant court involvement. No plan meeting may be convened without the court's order. The composition of the classes must be approved by the court. No plan can become effective until sanctioned by the court. At all stages the court is required to reach a judgment based on established principles and all interested stakeholders are entitled to be heard by the court.

123. Ms Toube relied on two elements in the Insolvency Regulation which, she submitted, indicated that the nature of the court's role in a part 26A plan constituted supervision over the assets and affairs of the debtor.

124. First, she pointed to a passage in Recital 10 (part of which is quoted above) which states that the Regulation should extend to proceedings which leave the debtor fully or partially in control of its assets and affairs.

125. Second, she pointed to a further passage in Recital 10 (which followed a reference to proceedings providing for a debt discharge or debt adjustment in relation to consumers and self-employed persons) which states:

> "In this context, the term 'control' should include situations where the court only intervenes on appeal by a creditor or other interested parties."

126. She submitted that although the immediate context of this statement appeared to refer to proceedings involving natural persons, it was clear from other parts of the Regulation that the same applied to a corporate debtor (referring to those articles which envisage a debtor in possession performing functions ordinarily performed by an insolvency practitioner: e.g. Article 2(3), 6(2), 28-29, 55(5) and (7) and 76).

127. I accept that the Regulation is clearly intended to apply to a debtor in possession and that in such a case the requirement that the proceedings be supervised by a court is satisfied if the court's involvement is only on the application of an interested party.

128. In the K&E letter, however, it was submitted that proceedings under Part 26A do not involve the kind of supervision over a debtor's affairs and assets that is required by Article 1(1)(b). The point was made that a Part 26A plan does not contain the type of court supervision or control that is present in all of the UK insolvency proceedings that are listed in Annex A. The nearest relative is a company voluntary arrangement ("CVA") under Part 1 of the Insolvency Act 1986. So far as court involvement is concerned, a CVA differs from a Part 26A plan in two ways. First, a CVA involves less court involvement at the stage of putting the arrangement into effect, because it is only involved if an application is made to it by a disgruntled party. Second, a CVA contemplates the potential for court supervision (on the application of an interested party) during the course of implementing the arrangement after its approval: see section 7(3) and (4) of the Insolvency Act 1986. In contrast, once the court has sanctioned a plan there is no further supervision or control by the court (save only for the possibility that the court might be called on to resolve any dispute as to construction of the plan).

129. I consider that a broad meaning is to be given to supervision and control by the court under Article 1(1), necessitated by the fact that the Recast Insolvency Regulation is undoubtedly intended to encompass proceedings designed solely to restructure indebtedness of a company that is not yet, but is likely to become insolvent, and is left in possession and control of its assets: see the references above to Article 1(1) and the Commission's proposal for the Recast Insolvency Regulation.

130. I have already referred to Recital 14 which envisages that proceedings aimed at rescue may include only some of the debtor's creditors, including just its financial creditors. Where the debtor remains in possession of its assets for the purpose of restructuring the debt of only its financial creditors, it is difficult to see how the proceedings by which that is achieved would ever involve a court supervising its assets or affairs in the way envisaged in a liquidation or even in a CVA. The only need for court supervision is in respect of the process by which the restructuring – e.g. adjustment of debt – is achieved.

131. In such a case, the supervision of the court may nevertheless be said to be over the debtor's affairs and assets in the sense that, while it is for the debtor to determine what arrangement it should reach for the purpose of deploying its assets towards satisfaction of its creditors' claims, the plan devised by the debtor can only come into effect if the court considers it appropriate to convene meetings of creditors and subsequently to approve it. I note that the court also retains a separate specific measure of supervision by virtue of section 233B of the Insolvency Act 1986, inserted by CIGA 2020. This disapplies so-called "ipso facto" clauses in contracts, which would entail termination of the contract if the company became subject to a relevant insolvency procedure. Relevant insolvency procedure is defined to include a

court order summoning a meeting of creditors to consider a plan under section 901C(1) of the 2006 Act. The court can, however, permit the termination provision to take effect if the court is satisfied that continuation of the contract would cause the supplier hardship: see section 233B(5) of the Insolvency Act 1986.

132. I do not accept that the fact that the company can at any time decide not to pursue the plan, and cannot be forced into a plan against its wishes negates the conclusion that the court is exercising supervision for the purposes of Article 1(1) of the Insolvency Regulation.

133. Accordingly, I consider that proceedings under Part 26A do comply with the requirements of Article 1(1) in the Recast Insolvency Regulation.

134. Stepping back from the detail of the separate elements addressed above, support for the conclusion that proceedings under Part 26A are within the scope of Article 1(1) comes from the fact that (as I was informed by counsel) the public version of the very recently enacted Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans (the "Dutch Scheme") is to be included within Annex A. According to a translation provided by the Plan Company, the Dutch Scheme appears to contain materially similar features to the Part 26A plan.

135. I was provided with an extensive review of, in addition to the Insolvency Regulation, the provisions of the UNCITRAL Legislative Guide to Insolvency Law, the UNCITRAL Model Law and its accompanying guide and the Convention on International Interests in Mobile Equipment (known as the Cape Town Convention). The purpose of this was to demonstrate that each instrument regarded insolvency proceedings as containing the same elements and that those elements were interpreted under each instrument in a manner consistent with the interpretation of the Insolvency Regulation advocated by the Plan Company.

136. While this comparative analysis does broadly bear out the Plan Company's contention, I do not find it necessary to rely on those other instruments. The question in this case is one of construction of the Lugano Convention. That raises a question of construction of the Insolvency Regulation because of the dovetailing principle mandated by European law. While uniformity with other international instruments dealing with similar subject matter is desirable, I was not persuaded that reference to those other instruments was relevant to the construction of the Lugano Convention.

137. Nevertheless, for the reasons set out above, I conclude that approaching the construction of the bankruptcy exclusion in the Lugano Convention both by reference to whether the relevant proceedings fall within the rationale for the exclusion, and by reference to whether the relevant proceedings comply with Article 1(1) of the Insolvency Regulation, proceedings under Part 26A are within the bankruptcy exclusion in the Lugano Convention. This court accordingly has jurisdiction notwithstanding the exclusive jurisdiction clause in the Bonds.

(3) Threshold Conditions A and B

138. In its skeleton argument, Hestia contended that neither of the Threshold Conditions is met, on a number of grounds:

(1) Hestia was not a creditor of the Plan Company, having executed a disclaimer of any rights under the Deed Poll;

(2) The Plan did not involve any compromise or arrangement between the Plan Company and its creditors (being one of the requirements under Threshold Condition B)

(3) The Plan Company was not a going concern and its financial difficulties were self-inflicted (it having voluntarily assumed all of its liabilities under the Deed Poll), so it could not be said that it was in financial difficulties that were affecting its ability to carry on business as a going concern or that the Plan was for the purpose of mitigating its financial difficulties;

(4) The circumstances of this case went far beyond those in other cases where a company had been incorporated for the purposes of assuming liabilities as co-obligor with existing companies.

*Hestia not a creditor*

139. Prior to filing its skeleton argument, Hestia had executed a disclaimer of its liabilities under the Deed Poll. Since its only relationship with the Plan Company was under the Deed Poll, the effect of the disclaimer was that it was not a creditor of the Plan Company at all.

140. Subsequently, however, Hestia withdrew the disclaimer. This point has therefore gone away. The Plan Company disputes that it is possible for a Bondholder to disclaim its interest or that if it occurred it would prevent the court from sanctioning the Plan. The possibility that another Bondholder might take similar action is not something which goes to the jurisdiction of the court to order meetings of creditors to be convened, and I need not address that possibility further here.

*Compromise or arrangement*

141. In the case of a scheme under Part 26, the requirement that there be a "compromise or arrangement" between the company and its creditors or a class of them has been given a broad interpretation. All that is required is some element of give and take, as opposed to mere surrender or forfeiture: see *Re Savoy Hotel Ltd* [1981] Ch 351, per Nourse J at p.359D-F; *Re Lehman Brothers International (Europe)* [2019] EWHC 1980 (Ch), per Hildyard J at [64].

142. In *Re Virgin Atlantic Airways Limited* [2020] EWHC 2919 (Ch), at [38], Trower J said that there was no reason to think that the phrase "compromise or arrangement" in section 901A was intended to be interpreted any differently. The same approach was adopted by Sir Alistair Norris in *Re Pizza Express* (above) at [27] and by Trower J in *Re DeepOcean* [43]. I agree.

143. Hestia contended in its skeleton argument, however, that:

(1) A plan must constitute an arrangement between the Company and its creditors in their capacity as such: *Re T&N Ltd (No 4)* [2007] Bus LR 1411, per David Richards J at [45] and *Re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161, per Patten LJ at [65]);

(2) While a plan may release or amend the rights of creditors against a third party, it can only do so to the extent that the release or amendment of those rights is "ancillary" to the arrangement between the company and its creditors and "necessary" to ensure the effectiveness of that arrangement: *Re Lehman Brothers International (Europe)*, above, per Patten LJ at [63] and [65];

(3) In this case, the Plan does not constitute an arrangement with the Plan Creditors in their capacity as such, because it is intended only to amend the terms of the contracts between the Plan Creditors and third parties (in particular the Issuer and Luxco II), and such amendments are neither ancillary to an arrangement between the Plan Company and the Plan Creditors nor necessary to ensure the effectiveness of any such arrangement.

(4) Instead, the Plan would cause amendments to be made to the Bonds and the SFA, agreements to which the Plan Company was not a party. Accordingly, it was not a compromise or arrangement with the Plan Creditors at all.

144. The extent to which a scheme under Part 26, which is intended to affect the relationship between the creditors and a third party, nevertheless constitutes a compromise or arrangement between the company and its creditors was considered at some length in *Re T&N (No.4)* (above).

145. In that case, a scheme was proposed between companies in the T&N group and certain of their current and former employees. The relevant employees were those whose claims against the companies in respect of damage caused by exposure to asbestos were covered by employer liability ("EL") insurance (referred to as the "EL Claimants").

146. As a result of the Third Party (Rights against Insurers) Act 1930, on the companies' entry into administration in 2001 the rights of the companies under the EL policies were transferred to the EL Claimants. The EL insurers had denied liability on grounds of alleged misrepresentation and non-disclosure.

147. Proceedings between the companies and the EL insurers were compromised by a payment of £36.74 million into an escrow account, but this was dependent on the sanctioning of a scheme between the T&N companies and the EL Claimants.

148. The essential features of the scheme were that, by way of compromise of the claims in the litigation, the scheme companies and the EL Claimants would not assert claims against the EL insurers, and the sum of £36.74 million would be held by trustees to pay a dividend on the claims of EL Claimants as and when they were established. Importantly, the rights of the EL Claimants against the companies themselves remained unaltered.

149. One of the issues before David Richards J was whether the scheme was a compromise or arrangement for the purposes of section 425 of the Companies Act 1986. It was contended that because the scheme did not purport to affect the rights between the companies and the EL Claimants it was not a compromise or arrangement between them.

150. David Richards J first noted, at [45], that

> "…whatever the precise meaning of a compromise or arrangement, it must be proposed with creditors or members of a company. It is implicit that it must be made with them in their capacity as creditors or members and that it must at least concern their position as creditors or members of the company."

He had already determined that the EL Claimants (even those to whom the companies' claims against the EL insurers had been transferred by operation of law) remained creditors of the companies.

151. Next, at [46] to [50], David Richards J held that "arrangement" has a very broad meaning, that "arrangement" and "compromise" were separate concepts and that an arrangement need not involve a compromise. He pointed to the fact that the great majority of schemes involving members did not involve a compromise. One such example is a scheme under which a third party acquires the shares in the company whether by transfer of shares or cancellation of existing shares and the issue of new shares. This is an arrangement between the company and its members because it involves a change of membership of the company. As these members schemes demonstrated, the give and take which a scheme must involve:

> "…need not be between the members and the company, but may be between the members and a third party purchaser, with the company's only function being to register the transfer of shares and thereby terminate the existing members' status as members."

152. At [51] he set out a number of reasons which demonstrated that the rights of the EL Claimants against the EL insurers were closely connected with the companies and the EL Claimants' rights against the companies, including that the claims of the EL Claimants arose out of the companies' obligations to its employees and that the EL insurance had been acquired by the companies for the purpose of protecting both themselves and their employees.

153. At [52], he said that the settlement of the litigation was in substance a tripartite matter, involving the companies, the EL insurers and the EL Claimants. The scheme was "…an integral part of a single proposal affecting all the parties, which includes also the trust and the trust distribution procedures established pursuant to the scheme."

154. The conclusions reached by David Richards J at [53] to [54] are worth setting out in full:

> "In my judgment it is not a necessary element of an arrangement for the purposes of section 425 that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within section 425. It is, as Nourse J observed, neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that other party.
>
> 54. These considerations all go to the meaning of arrangement in section 425 and hence the jurisdiction of the court under the section to sanction a scheme of arrangement. They do not fetter the discretion as to whether to sanction a scheme of arrangement. The looser the connection between the subject-matter of the scheme and the relationship between the company and creditors concerned, the more substantial might be the objections on discretionary grounds to sanctioning the scheme."

155. In the *Lehman Brothers* case ([2009] EWCA Civ 1161), the company promoting a scheme under Part 26 sought to rely on the *T&N (No.4)* decision in support of the proposition that a scheme could involve the compromise of proprietary claims of creditors against the company.

156. Patten LJ, at [61], having noted that the court's approach had been to give the word "arrangement" a relatively unrestricted meaning, said that it was nevertheless given content and meaning by the fact that it had to be between the company and its creditors. At [62], he said that *T&N (No4)* (and an Australian case, *Re Opes Prime Stockbroking Ltd* [2009] FCAFC 125, which reached a similar conclusion) indicated that the rights which could be released or re-organised under a scheme were not limited to those enjoyed by scheme creditors as creditors of the company. Those cases did not, however, go so far as to say that proprietary claims against the company could be included.

157. At [63], having noted that the decision in *T&N (No.4)* had proved controversial in Australia, Patten LJ nevertheless said it was:

> "…entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which require them to bring into account and release rights of action against third parties designed to recover the same loss. The release of such third party claims is merely ancillary to the arrangement between the company and its own creditors."

158. At [64] to [65], Patten LJ concluded that notwithstanding the decisions in *T&N (No.4)* and *Opes Prime*, "an arrangement between a company and its creditors must mean an arrangement which deals with their rights inter se as debtor and creditor".

159. That formulation excluded from the jurisdiction rights of creditors over their own property which is held by the company for their benefit, but:

> "…does not prevent the inclusion in the scheme of the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors."

160. The Plan Company also places reliance on *Re AI Scheme Limited* [2015] EWHC 1233 (Ch). In that case, Affinion International Limited ("Affinion") was faced with mis-selling claims from customers (potentially nearly two million customers with aggregate claims in excess of £358 million). Certain business partners with whose assistance Affinion had sold financial products were also facing such claims.

161. The FCA required a redress procedure to be put in place which was simple, quick and effective. Affinion sought to do so through a scheme under Part 26, involving the following structure:

(1) A new orphan entity was incorporated (the "scheme company");

(2) The scheme company entered into a "Co-obligor Deed Poll" under which it assumed primary liability along with Affinity and its business partners in respect of the mis-selling claims that might be brought;

(3) The scheme company entered into a scheme of arrangement under which:

   a. claimants who could establish a right to payment under the FCA redress procedure would be entitled to payment from the scheme company; and

   b. the scheme creditors' claims against Affinion and its business partners were released;

(4) The scheme company was "funded" by Affinion and its business partners. Although the judgment of Norris J suggests that Affinion and its business partners would pay the amount of established claims to the scheme company to enable it to satisfy those claims, in fact (according to the scheme documents which I was shown), the "funding" of scheme claims was achieved by a provision in the scheme rules that enabled the scheme company to procure that either Affinion or the business partners themselves would pay the scheme claims.

162. At [17] of his decision at the hearing to convene a meeting of creditors, Norris J concluded that the nature of the proposal was an "arrangement", noting that beyond the fact that the arrangement must be proposed with creditors, in their capacity as such, and must at least concern their position as creditors, "the requirements are few." Having cited both *T&N (No.4)* and *Lehman Brothers* in the Court of Appeal, he concluded that insofar as the scheme released the claims of creditors against Affinion or the business partners, and released the claims as between Affinion and the business partners, those features were a necessary element of the proposed compensation scheme.

163. The following propositions, relevant to the proposed Part 26A plan in this case, can be distilled from the above authorities, on the basis that the principles applied under Part 26 apply equally under Part 26A:

(1) A plan must constitute an arrangement *or* a compromise as between the company and its creditors in their capacity as such;

(2) A plan need not, however, alter the rights of creditors as against the company;

(3) An arrangement between the company and its creditors is not necessarily outside the permitted ambit of Part 26A because it alters the rights of creditors against third parties;

(4) Where the alteration of creditors' rights against third parties is both ancillary to the arrangement between the company and its creditors and necessary to ensure the effectiveness of that arrangement, then they will be permitted;

(5) More generally, the looseness of the connection between the subject matter of the scheme and the relationship between the company and its creditors is a matter which goes to the exercise of the discretion to sanction the scheme.

164. Hestia, in its skeleton argument, contended that in order to effect the release or variation of rights that Plan Creditors had against a third party such as the Issuer, it was necessary to establish that such release was both ancillary to the arrangement between the Plan Company and the Plan Creditors and necessary to ensure the effectiveness of that arrangement, and the Plan failed on both counts.

165. I do not think that Patten LJ in *Lehman Brothers* intended to create such a strict jurisdictional hurdle. As David Richards J said in *T&N (No.4)* the degree of (or lack of) connection between the arrangement between the company and its creditors and the subject matter of the scheme (or plan) is a matter which goes to the discretion of the court to sanction it.

166. As Ms Toube said, the Plan Company fully acknowledges the artificial nature of the co-obligor structure in this case. It was incorporated as recently as 8 December 2020. It assumed liability under the Deed Poll two days later. Until very recently, all of its liabilities would have been cancelled if the Plan was not sanctioned, although that is no longer the case given the amendment to the Termination Date noted above at [24]. The Plan Company has no assets other than the right to require other Group companies to satisfy their obligations. Any right of contribution that it might have had against other Group entities by reason of the performance of its obligations under the indemnity in clause 2.1 of the Deed Poll is illusory as it is deferred under clause 2.7 until all amounts payable by the Obligors are paid in full. Accordingly, from the moment it entered into the Deed Poll, it was inevitable that the Plan Company could never satisfy the liabilities it was assuming under it. That is addressed by the mechanism in the Contribution Payment Agreement, as described above, which entitles the Plan Company to require the relevant Obligor, principally the Issuer or Luxco II, to "fund" the payment of the Plan Company's liabilities by itself making payment directly to, respectively, the Bondholders or the Senior Lenders.

167. Notwithstanding the artificiality of this arrangement, it creates the following *legal* result. The Plan Company is liable to the Plan Creditors, co-extensively with, among others, the Issuer (in respect of the Bonds) and Luxco II (in respect of the SFA). The Plan will amend the Bonds and the Senior Loans, principally by extending their maturity dates, with the consequence that the Plan Company's own liability in respect of the Bonds and Senior Loans is postponed in the same way. The Plan did not originally say in terms that the Plan Company's liabilities were also to be amended. That was not fatal to the Plan constituting an "arrangement", both because it is not a pre-requisite of an arrangement that it affects the rights of Plan Creditors against the Plan Company (*T&N (No.4)*) and because in this case the amendment of Plan Creditors' rights against the other Group companies necessarily amends their rights against the Plan Company. The Plan has now been amended to provide expressly that the Plan Creditors rights against the Plan Company are similarly compromised.

168. Ms Toube submitted that the incorporation of the Plan Company and its assumption of liabilities under the Deed Poll were undertaken for the purpose of ensuring that there was an effective way in which the Group could be restructured so that it could receive a very substantial injection of new money from the Shareholders, enabling it to survive the unprecedented but hopefully temporary downturn caused by the Covid-19 pandemic. The evidence demonstrates that the Plan Company has considered all possible alternatives, but that none of them are realistically available. The structure has been chosen in order to overcome the practical reality that because of the quorum requirement in the Bonds, their maturity cannot otherwise be extended, and if their maturity is not extended the Group will inevitably fall into an insolvency process within weeks.

169. In order to head-off a possible complaint that the co-obligor structure has been deployed as part of a forum-shopping scheme to give the English court jurisdiction (in the international sense) that it would not otherwise have, Ms Toube pointed out that the Issuer's COMI has been successfully moved to the UK. While that is itself a form of forum-shopping, its efficacy in providing the English court with jurisdiction for the purposes of sanctioning a scheme (and therefore a plan) has been established in a number of cases, provided that in all the circumstances it constitutes (in the words of Newey J in *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch)) "good forum shopping". The co-obligor structure is not itself necessary to give this court jurisdiction: it is necessary to overcome the structural impediment within the terms of the Bonds.

170. Ms Toube and Dr Mokal cited a number of authorities for the proposition that even if a transaction contains elements that are artificial, in the sense that they are designed solely to take advantage of a particular statutory provision, then that alone is not a reason to deny the transaction its legal effect provided it is not a sham: see, for example, *Secretary of State v PAG Asset Preservation Limited* [2020] EWCA Civ 1017, per Asplin LJ at 57, citing Neuberger J in *National Westminster Bank plc v Jones* [2001] 1 BCLC 98.

171. In the context of a plan under Part 26A, the artificiality of the structure is undoubtedly an issue of direct relevance to the discretion to sanction the plan. It is possible to imagine uses of the co-obligor structure employed in this case that would be wholly objectionable. That might be the case where it unfairly overrode legitimate interests of creditors pursuant to the contracts governing their relationship with the primary obligor companies or under the system of law, including relevant principles of insolvency law, which applies to the relationship between them.

172. Similarly, there may be cases where the attempt to compromise plan creditors' rights against third parties was bound to fail because that compromise would not be recognised in any of the relevant foreign jurisdictions where it mattered.

173. The circumstances considered in the above two paragraphs would be principally relevant at the sanction hearing, although it is possible that in a given case the obstacles were so great and so clear that they would amount to a blot on the plan so that the court would refuse to convene meetings of creditors. I address that point below.

174. On the other hand, it is possible to envisage a case where the artificial structure is the only solution to enable a restructuring to be effected, all other possible alternatives having been explored and rejected for one or other reason of law or practicability; where the alternative is a value-destructive liquidation; and where the terms of the restructuring demonstrably benefit the affected creditors. In such a case, there would be a powerful argument that the artificiality of the structure should not prevent the company and its creditors being able to take advantage of the English scheme or plan jurisdiction.

175. I add that the essential structure employed in this case is not materially different from that used in the *AI* case (according to the rules of the *AI* scheme referred to above). Since there was no opposition to the *AI* scheme, that case has limited precedential weight, but it provides some comfort that a judge with the experience in this area of Norris J was content to allow such a scheme to proceed.

176. For the reasons I have set out above, I do not think that there is a jurisdictional impediment under Part 26A to the use of the co-obligor structure employed in this case. Whether it should prevent the court sanctioning the Plan on discretionary grounds is a matter to be left to the sanction hearing.

*Self-inflicted nature of the financial difficulties of the Plan Company*

177. The next objection taken by Hestia (see [138] above) was that the Plan Company's voluntary assumption of liabilities under the Deed Poll two days after its incorporation, and its lack of any assets or business, means that it is not in "financial difficulties" which might threaten its ability to carry on in business as a going concern, as required by Threshold Condition A and that the Plan is not required to address those difficulties. While the Group and the Issuer could clearly satisfy the Threshold Conditions, the Plan Company cannot.

178. In substance, I think this is a variation of the artificiality point I have just dealt with. The consequence of the Deed Poll is, as a matter of law, that the Plan Company is in fact insolvent. That clearly means it is in financial difficulties.

179. While it had no business at all prior to its entry into the Deed Poll, its very existence is for the purpose of enabling the Restructuring as a whole to take place. It is an essential component. If the Plan is sanctioned, and assuming the Group's business resumes as planned, then the Plan Company's recently assumed liabilities will be satisfied (it is proposed that the Plan Company remains in existence until the end of the maturity extension period). In other words, the Plan will have addressed its financial difficulties and its purpose – to enable the Restructuring of the Group – will have been achieved.

180. Accordingly, I consider that Threshold Conditions A and B are satisfied.

(4) Class Composition

*The test for class composition*

181. The test for class composition in a scheme 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: *Sovereign Life Assurance v Dodd* [1892] 2 QB 573, per Bowen LJ at 583.

182. In *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), at [45] to [48], Trower J concluded that the same approach to class constitution applies to a Part 26A plan. For the reasons he gives there, I agree. As he pointed out at [46], the exercise required to be undertaken under Part 26A is essentially the same as that under Part 26:

> "The purpose of class meetings under Pt 26A is to enable those with a genuine economic interest in the company (as to which see s.901C(4) and 901G(5)) to reach a collective conclusion on whether the company's proposals for the variation of their rights ought to be approved."

183. There is extensive case-law, as cited in Ms Toube's and Dr Mokal's skeleton arguments, in which the test for class composition in relation to schemes has been considered and various refinements have been added. I do not need to refer to all of these authorities, but confine myself to stating the following points which are now well established (in particular by Chadwick LJ in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 and by Lord Millett in *Re UDL Holdings Ltd* [2002] 1 HKC 172), remembering that the essential test remains as expressed by Bowen LJ over a hundred years ago.

(1) The creditors' rights that fall to be considered are both their existing rights against the company and the rights conferred by the scheme/plan;

(2) The existing rights must be assessed in the context of the relevant comparator, described by Hildyard J in *Re APCOA Parking (UK) Ltd* [2014] EWHC 997 (Ch), at [32], as "what would be the alternative if the scheme does not proceed";

(3) It is rights, not interests, that fall to be taken into account for the purposes of class composition. Without attempting an exhaustive definition, rights of the creditors against third parties (for example against guarantors for the company's debts) will generally constitute interests as opposed to rights; differences in interests may be relevant to the discretion to sanction the scheme/plan;

(4) Even if there are differences in rights as between different groups of creditors, that is not necessarily fatal to them being placed in the same class: it is still necessary to consider whether the differences are such that it is impossible for them to consult together with a view to their common

interest. This has been expressed (for example by David Richards J in *Re Telewest Communications plc* [2004] BCC 342 at [40]) as whether there is more to unite than to divide the relevant creditors.

184. In relation to schemes, it has been often said that the court should be careful to avoid unnecessary proliferation of classes, as by ordering separate meetings the court might give a veto to a minority group. It is important that the test for class composition should not be used as an instrument of oppression by a minority: see *Hawk Insurance* (above), per Chadwick LJ at [33]. The introduction of the cross-class cram-down in Part 26A has potentially altered the dynamic in this respect. The possibility for hold-out by a minority has been reduced. Nevertheless, I do not think this impacts significantly on the application of the test, and the need to enquire whether there is more that unites than divides the members of the proposed class. As Trower J pointed out in *Virgin Atlantic*, at [46], there may be an opposite incentive for a company to *increase* the number of classes in order to ensure that at least one class votes in favour of the plan so that it can take advantage of the cross-class cram-down.

185. Part 26A deploys the concept of the "relevant alternative" in section 901G of the 2006 Act, for the purposes of cross-class cram-down. It is there defined as "whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F". On this application I assume, without deciding (because it is unnecessary to do so), that this is intended to mirror the test for identifying the appropriate comparator for the purposes of class composition.

*Application of the test in this case*

186. The first question is to identify what rights the Plan Creditors would have against the Plan Company in the relevant comparator.

187. This case is, in this respect, highly unusual. The Plan Creditors are creditors of the Plan Company solely by virtue of the Deed Poll and the associated Contribution Payment Agreement. As I have noted above, under the terms of the Deed Poll in the form existing at the date of the hearing, in the event that the Plan did not proceed then both of these instruments fell away: all liabilities and obligations of the Plan Company under the Deed Poll would be irrevocably and unconditionally cancelled and released.

188. On that basis, in the relevant comparator the Plan Creditors have no rights against the Plan Company at all.

189. Ms Toube rightly did not seek to suggest that, on this basis, the rights of the Plan Creditors against the Plan Company in the relevant comparator would be the same because they would all have *no such* rights. The only possible conclusion, on the basis of the Deed Poll as it existed at the date of the hearing, was that for the purposes of considering class composition the existing rights of Plan Creditors would be regarded as the rights that they had (in the case of the Senior Lenders) against the obligors in respect of the SFA and (in the case of the Bondholders) against the obligors in respect of the

Bonds. Those rights of the Bondholders and those rights of the Senior Lenders are materially different, being against different entities.

190. I need to consider whether the recent amendment to the Deed Poll makes any difference. It is true that, since the Deed Poll will not now terminate if the Plan is not approved, the likely alternative includes the Plan Company suffering a similar fate to the rest of the Group and going into insolvent liquidation. I do not think, however, that this alters the conclusion that for the purposes of considering class composition, the Senior Lenders and the Bondholders have different existing rights.

191. As I have noted above, the purpose of dividing the creditors into classes is so that those with a genuine economic interest can reach a collective conclusion on the proposed arrangement. None of the Plan Creditors has a genuine economic interest in the Plan Company, and none of them would have a genuine economic interest in its liquidation. That is because: the Plan Company has no assets other than the right to require other Group entities to satisfy their obligations; it assumed obligations under the Deed Poll that it was never going to be in a position to satisfy from any assets of its own; and its obligation, taking the Deed Poll and Contribution Payment Agreement together, is limited to procuring that the obligors in respect of the SFA pay the amounts due to the Senior Lenders and the obligors in respect of the Bonds pay the amounts due to the Bondholders.

192. Accordingly, while in a technical legal sense the Plan Creditors would have claims in the liquidation of the Plan Company, in substance they would be reliant for any recovery on the obligors under, respectively, the SFA and the Bonds. On receipt of the draft of this judgment, the Plan Company pointed out that if the relevant obligors did not pay, then the Plan Company would have a right in damages against them for breach of their obligation *to the Plan Company* to satisfy their obligations to Plan Creditors. I accept that this is a further element in the legal structure. Since it was said that this may raise a point relevant to the sanction hearing and was not debated at the hearing I will say no more about it at this stage, other than it does not alter my conclusion as to class composition.

193. In short, in seeking to identify the appropriate existing rights of Plan Creditors when considering class composition, I consider it is necessary to look through the artificial structure in this case. When that is done, the Senior Lenders clearly have different rights to the Bondholders, by reason of the different identity of the obligors in respect of the SFA and the Bonds.

194. Further, I consider that the rights conferred by the Plan on the Senior Lenders are different to the rights conferred on the Bondholders. That is because the only substantive effect of the Plan is to amend the contracts between the Plan Creditors and their respective, and different, groups of obligors. The principal right conferred by the Plan on the Senior Lenders is the right to be paid interest for five further years, and to be repaid capital in five years' time, by Luxco II and the other obligors in respect of the SFA. The principal right conferred by the Plan on the Bondholders is to be paid interest during, and to be repaid capital after, a similar time period, but by the Issuer and the Parent.

195. I did not understand Ms Toube to contend otherwise than that the rights of the Senior Lenders were different to the rights of Bondholders (although I did not receive any submissions on this point following, and in light of, the amendments to the Deed Poll).

196. She contended however, that there is nevertheless more that unites the Plan Creditors than divides them. That is because if the Plan does not proceed the most likely alternative is the liquidation of the Group and, in that event, the Bondholders would be likely to recover significantly less (between 2.6% and 5.7% of their debt) than the Senior Lenders (between 6.3% to 19.2% of their debt). The Plan gives all creditors a real prospect of full recovery, over time. The Bondholders therefore have an even greater incentive to approve the Plan than the Senior Lenders, all of whom have already agreed to do so.

197. I cannot accept this contention, which stretches the concept of "more to unite than to divide" to breaking point. It has often been stressed, in the context of sanctioning schemes, that the creditors are better placed to consider what is in their interests than the court and, for that reason, the court will be slow to differ from the meeting. In the same way, at the convening hearing, the court ought not to second guess the commercial decision of the creditors at the meetings yet to be held.

198. In particular, it is not for the court, at the stage of convening meetings, to assume that a particular class of creditors would be bound to accept the plan, in all its respects, because it considers those creditors are undoubtedly better off under the plan than in the alternative of the company entering liquidation. The Plan is the product of a lengthy negotiation that has involved all of the Senior Lenders but none of the Bondholders. While the role of the court is limited to approving the scheme or plan that the company chooses to promote, that does not preclude the possibility that creditors in a particular class might persuade the company and other groups of creditors to agree to modifications to the proposed scheme in one or other respect in order to ensure their approval. It is only if the creditors are able to consult together with others having the same interest that they would have that opportunity.

199. Further, I do not accept that it is enough to focus solely on the comparative likely recovery of the Bondholders and Senior Lenders in the event of a liquidation, now, in order to show that the Bondholders have an even greater incentive than Senior Lenders to vote in favour of the Plan. Since under the Deed Poll the Company's obligation to the Plan Creditors is satisfied by procuring that Luxco II (and other obligors in respect of the SFA) pay the Senior Lenders and that the Issuer and Parent (as obligors in respect of the Bonds) pay the Bondholders, the Plan exposes the Bondholders to an additional five years' exposure to the credit risk of entirely different corporate entities to those to whom the Senior Lenders are exposed. Those are materially different rights which in my judgment make it impossible for the Bondholders and Senior Lenders to consult together with a view to their common interest.

200. The rights conferred by the Plan on the Bondholders differ to those conferred on the Senior Lenders in the following additional ways:

(1) while the Bondholders will receive interest at a fixed rate of 3% in return for the maturity date extension, the Senior Lenders will receive interest at rates based on EURIBOR plus a margin which varies depending upon the ratio of net debt to EBITDA. In addition, the interest payable to the Senior Lenders may be capitalised at the borrowers' option;

(2) the existing maturity dates are different, so the five-year extension will result in the Bondholders being exposed to the credit risk of the Issuer and the Parent until February 2027, whereas the Senior Lenders would be exposed to the credit risk of Luxco II and the other obligors in respect of the SFA only until October 2026;

(3) a right which the Bondholders currently have (that an event of default can be triggered by a change of control) is removed by the Plan, whereas no similar right exists for Senior Lenders.

201. Ms Toube accepted that where the relevant comparator is an insolvent liquidation in England, then the imposition by the plan of different interest rates and different maturity dates creates a difference in rights, even where that merely reflects existing contractual rights. That is because in a liquidation, first, there would be no interest payable at all unless and until there was a surplus of assets after paying all proved debts and, second, the liabilities owed to both the Senior Lenders and the Bondholders would be accelerated so as to become immediately due and payable.

202. For reasons I have set out above, however, I consider that the existing rights to take into consideration are those against the Group entities that are liable to, respectively, the Senior Lenders and the Bondholders.

203. In the case of the Issuer, the comparator would appear to be an insolvent liquidation in England, because its COMI has been moved here. It is not clear to me where the liquidation of Luxco II or the other obligors would take place, and there is no evidence as to the treatment of interest in such other possible liquidations. So far as the extension of maturity is concerned, and the amendment of the change of control provision in the Bonds, these are in any event differences that stem from the fact that the Plan perpetuates the rights of the two groups of creditors against different sets of obligors.

204. It is true, as Ms Toube submits, that the difference in maturity dates under the Plan ought not to have any material effect, because the Plan is intended to enable the Group to continue as a going concern. That is not, however, a certain outcome, and the difference in maturity dates results in a difference in the length of time for which the two groups of creditors will be exposed to *risk* that the Group fails in the future.

205. As to the removal of the change of control provision in the Bonds, Ms Toube explained that this is a necessary part of the Plan because the injection of new money will inevitably lead to that provision being breached. While that provides a rational explanation such that the Bondholders ought not to be dissuaded from voting for the Plan, it nevertheless results in a change which they, and not the Senior Lenders, will suffer.

206. As to interest rates, the evidence demonstrates that the likely difference in return overall is small: indeed the Senior Lenders may end up with slightly less, or slightly more, interest recovery than the Bondholders.

207. If these three points had stood alone, I may well have taken the view that they fell within the category of differences that, in the context of the Plan as a whole, ought not to prevent the Bondholders from consulting with the Senior Lenders with a view to their common interest.

208. Together with the fundamental difference that the only material rights of the Bondholders and the Senior Lenders are, and will continue to be, against completely different entities, however, I think that the differences in rights overall do require the Bondholders and Senior Lenders to be placed in different classes.

<u>(5) Other issues which might preclude the court sanctioning the Plan</u>

209. I have addressed the material points of objection raised in Hestia's skeleton argument above. There is no other matter which I need to consider at this stage as providing a reason why the court would not sanction the plan if the meetings approve it by the requisite majorities.

210. Nor is it necessary for me to consider whether, if the cross-class cram-down mechanism is required at all in this case, it would be appropriate to apply it in circumstances where one class has already agreed, unanimously, to approve the Plan.

211. One of the discretionary factors in relation to a cross-border scheme is whether it will be effective in the relevant foreign jurisdictions. That is of particular relevance, as I have noted above, given the artificiality of the structure adopted in order to compromise Plan Creditors' claims against other Group companies.

212. The Plan Company has adduced evidence from experts in both Swiss law and Luxembourg law. Both experts are of the opinion that the Plan, and its compromise of claims by Plan Creditors against other obligors in the Group, would be recognised and enforced in their respective jurisdiction, notwithstanding that they conclude that it is to be regarded as an insolvency proceeding and thus within the bankruptcy exclusion in the Lugano Convention. Both experts place reliance on the fact that the Plan Company is incorporated in, and has its COMI in, England and the fact that the Issuer has moved its COMI to England. This expert evidence (including the steps taken to shift COMI) falls to be considered more thoroughly at the sanction hearing. For present purposes, I am satisfied that in this regard there is no blot on the scheme such that I should refuse to order meetings to be convened.

(6) Practical Considerations

213. The Plan Company proposes to give one month's notice of the creditors' meeting. I consider that this is a sufficient period of notice for the Bondholders, notwithstanding that they are likely to be mostly retail holders with relatively small holdings. While the structure that has been created for the purposes of the Plan involves some complexities, the essential question for Bondholders is very straightforward: do they wish to take their chance in a liquidation which is likely to provide them with minimal return, or extend the maturity on the Bonds for a further five years, with interest payments continuing at the contractual rate in the meantime, with a reasonable chance (at least) of being paid in full? Having already been provided with the Practice Statement Letter, which sets out the essential elements of the Plan, in December 2020, the period of a further month should be more than sufficient for Bondholders to consider their position.

214. The Plan meetings will take place remotely, in accordance with the decision of Trower J in *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch). That is likely to work to the advantage of Bondholders in this case, given they are unlikely to be physically in this jurisdiction. The evidence for the sanction hearing will need to deal with the matters identified by Trower J at [42] to [43] in that case.

215. Finally, I am required to review, though not approve, the explanatory statement for the purposes of considering whether it is in an appropriate form. There is always a tension between providing all relevant information which plan creditors may want to see and doing so in a sufficiently clear and succinct way that it is readily comprehensible. The explanatory statement in this case does indeed contain a large volume of material. The essence of the Plan and the commercial context is, however, explained in the course of a few pages in the letter from the Plan Company at the start of the document. I am satisfied that it is in an appropriate form.

Conclusion

216. For the above reasons, I conclude that this court has jurisdiction to sanction the Plan in respect of the Plan Company, that the Plan involves a compromise or arrangement within the meaning of Part 26A of the 2006 Act, and that it is appropriate to direct the convening of two meetings of creditors, one for the Senior Lenders and one for the Bondholders.