IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2020] EWHC 2191 (Ch)

No. CR-2020-003222

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 4 August 2020

IN THE MATTER OF **VIRGIN ATLANTIC AIRWAYS LMITED**
A N D
IN THE MATTER OF **THE COMPANIES ACT 2006**

Before:

MR JUSTICE TROWER

B E T W E E N :

VIRGIN ATLANTIC AIRWAYS LIMITED — Applicant

MR D. ALLISON QC, MR R. PERKINS and MS L. PYPER (instructed by Allen & Overy LLP) appeared on behalf of the Applicant Company.

J U D G M E N T
(via Skype)

(Transcript prepared from extremely poor quality recording)

MR JUSTICE TROWER:

1 This is an application by Virgin Atlantic Airways Limited ("the Company") under s.901C(1) of the Companies Act 2006, for an order summoning meetings of certain of its creditors ("the Plan Creditors") for the purpose of considering and, if thought fit, approving a compromise or arrangement within s.901A of the Act ("the Restructuring Plan").

2 The Company is incorporated in England and Wales, and operates an international airline based in the United Kingdom. It has thirty-five aircraft and, in normal times, carries approximately 6 million passengers a year and has several thousand employees. Its principal operating centres are at Heathrow and Gatwick Airports, but it also has operations based in Manchester, Glasgow and Belfast. It is a wholly owned subsidiary of Virgin Atlantic Limited, 49 per cent of which is ultimately beneficially owned by Delta Airlines Inc and 51 per cent of which is ultimately beneficially owned by Sir Richard Branson, through Virgin Investments Limited ("VIL").

3 The financial position of the group of which the Company forms part has been severely affected by the COVID-19 pandemic, which has caused major disruption to the entire aviation industry. The impact on the group's business has been dramatic, with a reduction in bookings of 89 per cent year on year. The current demand is only 25 per cent of 2019 levels. This continues to be the case for the Company, because although the group resumed passenger flights to certain destinations from 20 July, the evidence is that demand is likely to remain low for some time and the Company does not expect to resume normal passenger flight operations before December of this year.

4 The liquidity crisis to which the Company is subject as a result of the COVID-19 pandemic means that, absent both a restructuring and an injection of new money, it is projected that the group's cash flow will drop to a critical level by the week commencing 21 September. One of the issues that gives rise to particular concern is that the rights of certain bondholders to commence an enforcement process over the Company's landing slots at Heathrow Airport are triggered when the free cash drops below $75 million, which is projected to happen in mid-September. There is a real risk that this development would ultimately destroy the group's business. Furthermore, the cash shortage is such that, absent a recapitalisation including an injection of new money, the group will run out of cash altogether by 28 September. If this were to be the outcome, the Company's directors are of the view that administration in mid-September 2020 would be inevitable. The evidence is that, in the event of administration, the ultimate return for unsecured creditors would be substantially less than the return that they would receive under the proposed Restructuring Plan.

5 The Restructuring Plan is part of a broader recapitalisation designed to reduce the group's debt to a sustainable level, with a restated repayment profile that, together with the provision of new liquidity, would enable the group to trade into the foreseeable future. The Company's directors consider that, with the benefit of the new monies being provided as part of the broader recapitalisation, the Restructuring Plan will enable the Company to trade as a going concern.

6 There are four categories of creditors with which the Restructuring Plan is concerned (i.e. the Plan Creditors), with claims totalling in the region of £1.5 billion. The Company proposes that a separate class meeting for each of them should be summoned under s.901C(1).

7 The first category of creditors are the lenders under a US $280 million multicurrency secured credit facility dated 17 January 2018 ("RCF"), which is governed by English law and interest on which is payable at LIBOR or EURIBOR plus 1.75 per cent. These creditors are called the "RCF Plan Creditors". The security they hold is over aircraft and aircraft engines. The RCF has been fully drawn since 20 March this year.

8 The second category of creditors are the lessors of twenty-four aircraft under various English law governed operating leases, maturing between March 2021 and January 2034. The sums outstanding to them in respect of existing and future liabilities amount to some US $1.25 billion. These creditors are called the "Operating Lessor Plan Creditors".

9 The third category of creditors are connected parties who are creditors of the Company through a number of licence, joint venture and service agreements together with a credit facility, all of which are governed by either New York law or English law. There is a sum of £400 million sterling outstanding under these arrangements. They are called the "Connected Party Plan Creditors".

10 The fourth category of creditors are unsecured trade creditors, where they are owed more than £50,000 as at 12 June 2020. Excluding certain categories, which I will come back to, they are called the "Trade Plan Creditors". There are 168 Trade Plan Creditors who are identified by name or description in an appendix to the Explanatory Statement, and they are owed approximately £54 million in aggregate.

11 In broad terms, the main categories of excluded creditors include the creditors who provide goods or services essential for the continuation of the Company's business or to the implementation of the recapitalisation, but they extend a little wider than that. On the face of it they all appear to have been excluded for respectable commercial reasons. I can summarise the principal categories as follows

a. The first, to which I have already alluded, are the more than 1,000 creditors with claims of under £50,000, the inclusion of which would have given rise to significant logistical difficulties. The aggregate amount owed to them is approximately 10 per cent of the aggregate owed to Trade Plan Creditors generally.

b. The second are public bodies with claims for liabilities such as air traffic control charges, together with insurance companies where the Company might otherwise be at risk.

c. The third broad category are creditors such as sales agents, whose continuing goodwill is essential to the continuation of the business, and other advisers and suppliers, whose continuation of services or supplies is essential to the continuation (and in some respects safety) of the Company's operations.

d. The fourth category are suppliers with whom the Company has already reached agreement for a compromise of their claim at or below the level for which the Restructuring Plan provides.

12 Apart from those Trade Creditors which are excluded from the description of Trade Plan Creditors for the purposes of the Restructuring Plan, the Company has other creditors and finance providers whose claims against it, or whose relationships with it, are being compromised by separate bilateral agreements entered into under the broader recapitalisation. These arrangements are described in Part A, para.7 of the Explanatory Statement, and I can summarise them as follows.

a. The lessors and lenders under eight finance lease agreements and their associated finance lease facility agreements. As at the end of June, the Company had substantial liabilities under these agreements totalling almost US $1 billion. Initially these creditors were to be included in the Restructuring Plan, but they have now all agreed to the Company's proposals and, because of the potential complexities of including them in the scheme, it is no longer intended that their rights should be compromised under the Restructuring Plan.

b. The second category of interested parties are bondholders under a slot securitisation, for whose benefit the Company's legal title to twenty-one summer and twenty winter slot pairs at Heathrow Airport can be required to be transferred to a special purpose vehicle, Virgin Atlantic International Limited ("VAIL").

c. The third category is a group of credit card acquirers, whose claims arise out of certain arrangements under which the Company is potentially liable to reimburse them for amounts collected from the customer on the original sale. I understand that this potential liability amounts to approximately £350 million but has been rearranged pursuant to a support agreement, details of which, like the other details of support arrangements, are give in the Explanatory Statement.

13 There are then a number of other miscellaneous liabilities including potential liabilities to counterparties under hedging arrangements and letter of credit facilities and group liabilities under certain aircraft delivery agreements which have been amended or deferred. The group has also been in discussions with the Civil Aviation Authority in relation to obligations which need to be fulfilled to ensure the continuation of its air operating certificate.

14 The recapitalisation of which the Restructuring Plan forms part, involves the injection of new capital. This is to come from three separate sources. The first is an injection of c.£170 million as secured financing from Davidson Kempner in the form of a new bilateral term loan facility and the subscription for a new issuance of bonds. The second is a £200 million unsecured junior term loan facility to the Company from VIL. The third is a US$30 million term loan facility from a new investor payable over a five-year term commencing in January 2022.

15 The Restructuring Plan itself provides that the Plan Creditors' claims will be compromised as follows:

a. So far as the RCF Plan Creditors are concerned, the RCF agreement will be converted into a term loan agreement, the maturity date will be extended, the repayment provisions will be amended, the margin will be increased, the covenants will be amended and part of the security will be released to be made available for charge to the new $30 million investor. 100 per cent of the RCF Plan Creditors have agreed to these terms.

b. So far as the Operating Lessor Plan Creditors are concerned, they will be offered three options, the first of which will be a rent deferral, the second of which could involve rent reduction and bullet repayment, and the third of which would involve lease termination and redelivery of the relevant aircraft. Again, 100 per cent of the Operating Lessor Plan Creditors have agreed to these terms.

c. So far as the Connected Plan Creditors are concerned, all accrued amounts will be capitalised in exchange for the issue of preference shares in VAL, with further shares being issued to some, but not all, of the Connected Plan Creditors in exchange for further amounts falling due during what is called the "Capitalisation Period". Again, 100 per cent of the Connected Plan Creditors have agreed to these terms.

d. The fourth category of creditor is the Trade Plan Creditors. So far as they are concerned, the amounts owed in respect of principal and accrued interest will be reduced by 20 per cent, 10 per cent of which will be paid within ten days of the effective date. The remainder will then be paid in eight equal quarterly instalments between December 2020 and September 2022, with interest accruing at 1 per cent. Supplies made after the date of the Practice Statement letter are not subject to compromise. The evidence is that the Company both expects to be able to pay these obligations to Trade Plan Creditors and will need to do so in order to continue to trade as a going concern.

16 The Trade Plan Creditors are the only Plan Creditors who have not been asked to sign up to a support agreement and, therefore, have not done so. There are logistical reasons for this. I shall come a little later to the steps taken to notify them of the terms of the Restructuring Plan and, indeed, of this hearing.

17 Turning then to the legislation, s.901C of the Act is contained in a new Part 26A, which has been inserted by Schedule 9 to the Corporate Insolvency and Governance Act 2020 ("CIGA"). Part 26A introduced a new restructuring procedure described by the Explanatory Notes to CIGA as a "restructuring plan". Those Explanatory Notes also make clear that the procedure was intended to draw on the practice and principles applied by the court in the sanctioning of compromises and arrangements under Part 26 of the Act.

18 I will quote a couple of short passages from those Explanatory Notes:

"*The new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement (approval by creditors and sanction by the court), but it will additionally include the ability for the applicant to bind classes of creditors (and, if appropriate, members) to a restructuring plan, even where not all classes have voted in favour of it (known as cross-class cram down). Cross-class cram down must be sanctioned by the court and will be subject to meeting certain conditions. As is the case with Part 26 schemes, the court will always have absolute discretion over whether to sanction a restructuring plan. …*

While there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."

19 The circumstances in which the jurisdiction to approve and sanction a restructuring plan is engaged are set out in s.901A of the Act, the terms of which are as follows:

> *"(1) The provisions of this Part apply where conditions A and B are met in relation to a company.*
>
> *(2) Condition A is that 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.*
>
> *(3) Condition B is that –*
> *(a) a compromise or arrangement is proposed between the company and-*
> *(i) its creditors, or any class of them, or*
> *(ii) its members, or any class of them, and*
> *(b) 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 subsection (2).*
>
> *(4) In this Part … 'company' … means any company liable to be wound up under the Insolvency Act 1986 …*".

20 Where the jurisdiction is engaged, the court is empowered by s.901C of the Act to order a meeting or meetings of creditors in language which mirrors the language of s.896(1) in relation to schemes under Part 26. That language is as follows:

> "*The court may, on an application under this subsection, order a meeting of the creditors or class of creditors … to be summoned in such manner as the court directs*."

21 The procedure for making an application is set out in a new Practice Statement dated 26 June 2020, which also applies to applications to sanction schemes under Part 26 of the Act. It is called *Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26 of the Companies Act 2006)*. This makes clear, by para.3, that it remains the responsibility of the applicant company to determine whether more than one meeting of creditors is required by a scheme and, if so, to ensure that the meetings are properly constituted. To that end, para.6 provides as follows:

> "*It is the responsibility of the applicant, by evidence in support of the application or otherwise, to draw to the attention of the court at the hearing for an order that meetings of creditors and/or members be held ("the convening hearing"):*
> *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*."

22 Paragraph 6c of the Practice Statement recognises that, like questions of class constitution and jurisdiction, the Company's ability to satisfy the conditions described in s.901A as Condition A and Condition B, are matters which the court will consider at the convening hearing. This reflects the fact that the language of s.901A(1) makes clear that the court's power to grant any relief under Part 26A, including the power to order a meeting of creditors or members under s.901C(1), is dependent on those conditions being met.

23 Paragraph 10 of the Practice Statement provides that it is open to the court to reconsider those threshold provisions at the sanction hearing, although the court will expect any objecting creditor who first raises any issue relating to the threshold conditions at the sanction stage to show good reason why they did not raise the issue at an earlier stage, i.e. normally at the convening hearing.

24 Before considering the issues which the Practice Statement contemplates should be considered at the convening hearing, I ought to deal with notification to creditors. Paragraphs 7 and 8 of the Practice Statement make clear that, where an application is made to convene a meeting or meetings in respect of a scheme which gives rise to any of the issues identified in para.6, the applicant should, unless there are good reasons for not doing so, take all steps reasonably open to it to notify any persons affected by the scheme of a number of identified matters. I will not list those matters in this judgment. However, they are all directed towards enabling the creditors concerned to determine whether or not they wish to participate in the convening hearing.

25 The Practice Statement also makes clear that it is the responsibility of the applicant to ensure that the notification is given in a concise form and is communicated to all persons affected in the manner most appropriate to the circumstances. It is also apparent, from para.8, that the notification should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed and to take appropriate advice and, if so advised, to attend the hearing.

26 In the recent decision of *ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch), Snowden J emphasised the importance of the company giving proper notice of its proposals in accordance with the Practice Statement and, in particular, to any creditors who have not been engaged in the process of initiating or negotiating the terms of the compromise or arrangement. As he said at para.47 of his judgment in a passage with which I agree:

> "*… the question of the adequacy of notice of the convening hearing is therefore not affected by the level of support for the scheme from the creditors who have already locked up. It falls to be judged by reference to the position of those who have <u>not</u> locked up and who might wish to oppose the formulation of classes proposed by the company*."

27 In the present case, therefore, the creditors with whom the court is particularly concerned are the Trade Plan Creditors. Unlike the other creditors, whose approval of the Restructuring Plan is now sought, the Trade Plan Creditors were not invited to enter into support agreements and were not part of the body of creditors with whom the Company entered into detailed negotiations on the terms of the restructuring. The nature of their claims, and the number of creditors involved, explains why the Company did not take steps to that end. Nonetheless, the fact that it did not do so makes it all the more important that

the court should give careful consideration to whether the notice actually given to them was sufficient.

28 Two particular steps were taken to notify the Trade Plan Creditors. The first was that, like all of the Plan Creditors, they were sent copies of a letter explaining the proposal on 14 July. This letter gave notice of this hearing and also directed them to a plan website where further details and documentation was available. Shortly after this letter was sent, four more Trade Plan Creditors were identified and they were sent a copy of the letter on the following day. The position was then updated by an addendum dated 20 July, giving an update on a number of points of detail, including, in particular, a change to the date on which the claims will be compromised in terms that were advantageous to the Trade Plan Creditors.

29 Secondly, all Trade Plan Creditors were invited to attend a virtual webinar on 21 July, a recording of which has remained on the Plan website. This explained the background to the recapitalisation, the likely outcome if the company were to go into administration and details of how to participate in the Restructuring Plan process.

30 For the following reasons, I am satisfied that these steps are sufficient to notify the Trade Plan Creditors of this hearing and otherwise to comply with paras.7 and 8 of the Practice Statement.

31 In the first place, there is detailed evidence as to how the Company went about identifying its trade creditors which appears, on its face, to be comprehensive.

32 Secondly, and unlike the circumstances described in *ColourOz*, the financial position of the Company is critical and there is compelling evidence that a conclusion of the restructuring is very urgent. The timetable which is in evidence, and described in the skeleton argument, requires a sanction hearing to be held at the beginning of September if the mid-September deadline for concluding the arrangements contemplated by the restructuring is to be achieved. This is not one of those cases in which the court is sceptical as to the genuineness of proposed deadlines. The evidence points to a very real prospect that the Company will go into administration with a substantial loss of value to creditors if the Restructuring Plan is not sanctioned in the early part of September.

33 Thirdly, the Trade Plan Creditors have had a period of twenty-one days from the time at which the Practice Statement letter was sent out, to consider their position and decide whether they wish to attend this hearing. They have also had the benefit of the webinar which I have already described. The terms of the arrangements that were offered to them, while serious from their own personal positions, are not particularly complex to grasp in concept. Although there is much greater complexity in the arrangements being offered to those other classes of creditor with which they may have wished to compare their own position, I am satisfied that they have had adequate time to carry out that exercise.

34 Fourthly, a significant number of Trade Plan Creditors have been in contact with the Company to discuss their position and none have said that they have not had sufficient time to advance the points that they wished to make. Some of them do not like the deal that is on offer and doubtless a number have expressed their views in forceful terms. However, I have not been able to identify that any of the complaints and criticisms that have been aired raise questions going to the constitution or conduct of the class meetings. They are the kind of matters which, if to be raised at all, should be raised as points going to the fairness of the Restructuring Plan at the sanction hearing.

35 Turning to the points which the Practice Statement requires the court to consider at the convening hearing, it is well-established in the context of a Part 26 scheme that the function of the court at this stage is emphatically not to consider the merits or fairness of the proposed scheme. Those questions arise for consideration at the sanction hearing, if the scheme is approved by the statutory majority (see *Re Telewest Communications plc (No 1)* [2004] BCC 342 at [14] per David Richards J). In my view, para.6d of the Practice Statement makes clear that the same approach should be adopted at the convening hearing held for the purpose of giving directions to summon meetings of creditors for a Part 26A restructuring plan.

36 The first question which arises at this stage is the jurisdictional one of whether the Company is a "*company*" within the meaning of s.901A. It will be if, but only if, it is liable to be wound up under the Insolvency Act 1986 (see s.901A(4)). As the definitions of "*company*" are the same, I see no reason to think that what Lewison J had to say in *DAP Holding NV* [2005] EWHC 2092 (Ch) should not apply to Part 26A in the same way as it applies in Part 26. It follows that, as the Company is incorporated in England and Wales, it is for these purposes liable to be wound up under the Insolvency Act 1986 and is therefore an entity in relation to which the provisions of Part 26A apply.

37 The next series of questions relate to satisfaction of the statutory conditions in s.901A. As to Condition A (s.901A(2)), there is clear evidence that the Company has encountered financial difficulties that are affecting, and will affect, its ability to carry on business as a going concern. Those difficulties were the subject of a detailed explanation in the witness statement of Shai Weiss and are also described at some length in the Explanatory Statement. I am satisfied that, because of those difficulties, the Company is on the brink of collapse. The evidence demonstrates that, if the restructuring is not approved the Company's ability to carry on business as a going concern will, at the very least, be severely impaired with the probability that it will enter into administration by September 2020, with a view to winding up the business and selling such assets as are able to be realised. I am satisfied that Condition A is met in relation to the Company.

38 As to Condition B (s.901A(3)), the proposal must be for a compromise or arrangement between the Company and its creditors, or any class of them. It is well-established that for the purposes of Part 26 the compromise or arrangement requires some element of give and take between a company and its scheme creditors, but a definition is neither necessary nor desirable (see, by way of example, *Re Savoy Hotel Ltd* [1981] Ch 351, 359 and *Re Lehman Brothers International (Europe)* [2019] BCC 115 at [64]). There is no reason to think that the concept of what is capable of amounting to a compromise or arrangement for the purposes of s.901A is any different to the same phrase used in Part 26. Indeed, quite the contrary, there is every reason to think that Parliament has intended the same language should be construed in the same way. In my view, the Restructuring Plan satisfies this aspect of condition B.

39 As to the second limb of Condition B, the purpose of the compromise or arrangement must be to eliminate, reduce or prevent, or mitigate, the effect of any of the company's financial difficulties under condition A. I agree with Mr Allison QC's submission that this is broad language which was intended to be expansively construed. I am satisfied that the purpose of the Restructuring Plan is to mitigate, and, if possible, to eliminate the financial difficulties which the Company has encountered as a result of the COVID-19 pandemic which has brought the Company to the brink of collapse. The evidence neither discloses nor hints at any other reasons why the Restructuring Plan has been proposed. It follows that, in my view, the Restructuring Plan satisfies this aspect of Condition B as well.

40 The next question which arises is any issue which may go to the constitution of the creditors' meeting.

41 The long established principle for class constitution in the case of a Part 26 scheme is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see *Sovereign Life Assurance v Dodd* [1892] 2 QB 573, 583 and *Re UDL Holdings Ltd* [2002] 1 HKC 172 at [27] per Lord Millett NPJ). As Chadwick LJ said in *Re Hawk Insurance Company Ltd* [2002] BCC 300 at [30]:

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

42 In carrying out that exercise, it is the legal rights of creditors, not their separate commercial or other interests, which determine the appropriate constitution of a class. I also agree with the Company's submission that the rights of those included in a single class can be subject to material differences provided that they are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. In determining that question, it is important to have in mind what Neuberger J said in *Re Anglo American Insurance Co Ltd* [2001] 1 BCLC 755, 764: "*if one gets too picky about different classes, one could end up with virtually as many classes as there are members of a particular group*", a point which has been made in different language by many other judges.

43 In analysing whether scheme creditors should or can be required to consult together as a single class, the court must identify the substance of the scheme creditor's existing rights and then compare them to the rights which they will have in consequence of the scheme. Where a scheme is proposed as an alternative to a formal insolvency procedure, it is necessary to identify the rights that the creditors would have in a formal insolvency proceeding. As a matter of principle, these are the rights which are to be compromised under the scheme (see, in particular, the way the point is described by Chadwick LJ in *Re Hawk* at para.42 and David Richards J in *Re T&N Ltd (No 4)* [2007] Bus LR 1411 at [87]).

44 In determining whether to adopt the same approach in relation to a Part 26A restructuring plan, it is appropriate to have in mind the principal differences between it and a Part 26 creditors' scheme. They are, in broad terms, as follows:

> a. First, under a Part 26A restructuring plan, every creditor whose rights are affected by the compromise or arrangement has a statutory entitlement to participate in a meeting unless the court determines that none of the members of his class has a genuine economic interest in the company (see s.901A(3) and (4)).
>
> b. Secondly, under a Part 26A restructuring plan, the statutory voting majority is 75 per cent by value of creditors present and voting (see s.901F(1)). There is no requirement for a majority by number.
>
> c. Thirdly, Part 26A includes provision for cross-class cram down of a dissenting class under s.901G where none of the dissenting class would be any worse off than they would be in the event of a relevant alternative (s.901G(3), also called condition A). The relevant alternative is defined by s.901G(4) to mean whatever the court

considers would be most likely to occur if the compromise or arrangement were not to be sanctioned. Where that is established, and the compromise or arrangement has been agreed by a class the members of which would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative (s.901G(5) also called condition B), the fact that that dissenting class has not agreed a compromise or arrangement does not prevent the court from sanctioning it under s.901F.

45 I am conscious that this is the first Part 26A convening application which has come before the court and that there has been no adversarial argument. I therefore do not think that it is appropriate for me to give elaborate reasons, but I do not think that any of those differences should be reflected by a difference in approach to class constitution. While the court undoubtedly has power to sanction a restructuring plan in circumstances in which it would not have power to sanction a Part 26 compromise or arrangement, it seems to me that the approach to classifying the other creditors with whom they should be required to consult is broadly the same. There are a number of reasons for this.

46 The purpose of class meetings under Part 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. In essence, this is the same exercise as the one which is carried out by creditors asked to approve a compromise or arrangement under Part 26. In both exercises Parliament has chosen the same language of compromise and arrangement to describe what must be approved.

47 Under Part 26, the question of whether or not consultation is possible depends in large part on whether, ignoring any personal or extraneous interests, there is more that unites the relevant creditors than divides them (see, for example, Hildyard J in *APCOA Parking Holdings GmbH* [2015] Bus LR 374 at [52]), because if there is they should be required to consult together when determining whether to agree to the variation of their rights to be given effect by the scheme. It seems to me that this approach is equally applicable for a restructuring plan under Part 26A. I say that, having regard to the fact that the cross-class cram down provisions under s.901G, and, in particular, the requirements of section 901G(5), point to the possibility that in some circumstances a company may have an incentive to increase rather than reduce the number of classes in respect of which class meetings need to be called so that it can improve the prospect that at least one class votes to agree it.

48 In addition to these broader questions, there are a number of more specific matters which inform and, in my view, confirm this conclusion. Firstly, the language of the relevant parts of s.901A and 901C precisely tracks the language of the comparable sections in Part 26, i.e. s.895 and 896. Secondly, the wording of the Explanatory Notes contemplates a commonality of approach which was said to enable the court to draw on the existing case law where appropriate. Thirdly, the constitution of classes has long been at the heart of the case law dealing with schemes under Part 26 and its statutory predecessors. It is to be expected that, if a difference in approach was anticipated by Parliament, it would at least have been signalled in some way in the legislation, which is not the case.

49 Applying those principles to the classes proposed by the Company, it is clear that the RCF Plan Creditors should vote in a single class. Their rights against the Company arise out of a single facility agreement. Their rights under the Restructuring Plan are the same and their rights in the insolvency if the Restructuring Plan is not sanctioned are the same. They should, in my view, be in the same class.

50 As to the Operating Lessor Plan Creditors, each is to be treated in the same way under the Restructuring Plan. Each has the same ability to choose the option which it prefers. Differences in choice, depending on their own personal preference, amount to differences in the way in which each creditor chooses to enjoy the rights that it is given under the Restructuring Plan. In my view they do not amount to differences in the rights themselves, cf *Re Noble Group Ltd* [2019] BCC 349, 372 and 386.

51 On the other side of the coin, if the Restructuring Plan were not to be sanctioned, each would have the same legal rights against the Company commensurate to the value of their claim. Thus, each would be entitled to terminate the lease agreements relating to the relevant aircraft and each would have a claim against the Company as an unsecured debt. To the extent that there are small differences in their contractual rights against the Company, such as interest rates and maturity dates, it is well-established that they will not normally lead to a need for separate classes. This is either because such rights are irrelevant in the context of a formal insolvency (for example post-insolvency interest is only paid when all other creditors have been paid in full and long- maturing liabilities are accelerated to the insolvency date), or because they are taken into account in reaching a true value for the claim. In my view, this approach is applicable in the present case and the Operating Lessor Plan Creditors should all go into the same class.

52 In the case of the Operating Lessor Plan Creditors, as well as in the case of the RCF Plan Creditors, I also agree with Mr Allison QC's submission that there is no basis on which each class can be further fractured.

53 As to the Connected Party Plan Creditors, they all have claims against the Company which would amount to unsecured debts in an insolvency and are all receiving preference shares in exchange for and to the value of those claims. On the face of it, it is plain that they should all be placed in the same class. The only issue that gives rise to a possible problem is the position of Delta, which is the connected party I mentioned earlier. It is not being required to exchange its future claims under the Delta Air4 Agreement for preference shares.

54 In my view, this is a difference in treatment which, from a purely objective perspective, might have given rise to difficulties in placing Delta in the same class as the other Connected Party Plan Creditors. However, the evidence is that it is not impossible for all of these creditors, including Delta, to consult together as to the merits of the Restructuring Plan with a view to their common interest because 100 per cent have signed up to a support agreement. In my view, this demonstrates and reflects, albeit at a slightly earlier stage, the wisdom of Lindsay's comments in *NRG Victory Reinsurance Ltd* [2006] EWHC 679 (Ch) at [15]:

> "… *speaking generally, while some creditor issues will be capable of being clearly seen to have no real prospect of success and some others no real prospect of failure, there will always be some in the middle or thereabouts in any spectrum and thus being such that until all the creditors have, in fact, had the opportunity of meeting and consulting together it will be exceptionally difficult to be sure whether it will prove impossible or not for them to consult together with a view to their common interest*."

55 As to the Trade Plan Creditors, these are the only creditors sought to be bound by the Restructuring Plan who have not all consented to the proposals. The terms of their

contractual arrangements with the Company are all different, as is the quantum of those claims. However, as the Company points out, the proper comparator for assessing their ability to consult together with a view to their common interest is a formal insolvency. If that is the eventuality, each of those claims would become a right to prove for an unsecured debt. Such differences as there may be would simply be reflected in the value of their claims. The Company has adduced evidence which compares the value of their rights in a formal insolvency to the value of their rights under the Restructuring Plan. This evidence demonstrates two things. The first is that there is effective comparability as to the variation of rights so far as all members of the class are concerned. The second is that the Trade Plan Creditors would appear to be no worse of and, at first blush, better off than would be the case in an administration.

56 The consequence of this second point is that the Company considers that the cram down jurisdiction under s.901G is likely to be available at the sanction hearing should it be required because condition A as described in s.901G(4) will be satisfied. That is not a matter for me today, nor is it appropriate for me to consider whether condition B (s.901G(5)) will be satisfied either. It suffices to say that I am satisfied that all Trade Plan Creditors have rights which are sufficiently similar that it is not impossible for them to consult together with a view to their common interest and, for that reason, they should be placed in the same class.

57 I now turn to questions of international jurisdiction. In broad terms, questions of sufficiency of connection (where applicable) and international effectiveness are matters for the sanction hearing (see, for example, *ColourOz* at [57]). But the Company has also made submissions as to whether the court must be satisfied that it has jurisdiction over Plan Creditors pursuant to the Recast Judgments Regulation (EU 1215/2012). This point arises to the extent that any of them are domiciled in EU member states outside the United Kingdom.

58 It is now well-established that an application for sanction of a Part 26 scheme is a civil or commercial matter and the reasoning seems to me to apply with equal force to a Part 26A restructuring plan. However, it has never been completely determined whether the rule laid down in Article 4(1) of the Regulation, that any person domiciled in an EU member state must (subject to any applicable exception) be sued in the courts of that member state, also applies to a Part 26 scheme, although the matter has been referred to and debated in a number of cases.

59 In the present case, I shall adopt the usual practice of assuming without deciding that Chapter II and, therefore, Article 4 of the Recast Judgments Regulation applies to these proceedings on the basis that Plan Creditors are being sued by the company and that they are defendants, or to be treated as defendants, to the application to sanction the scheme. If, on the basis of that assumption, the court has jurisdiction because one of the exceptions to Article 4 applies, then there is no need to determine whether the assumption is correct and I will not do so.

60 In the present case, the Company relies on the exception provided for by Article 8 of the Recast Judgments Regulation. By Article 8, a defendant who is domiciled outside a member state may be sued in that member state provided that another defendant in the same action is domiciled there and provided that it is expedient to hear the claims against both together to avoid risk of irreconcilable judgments resulting in separate proceedings. The consequence of this is that if sufficient scheme creditors are domiciled in England then Article 8(1) confers jurisdiction on the English court to sanction a scheme affecting the rights of creditors domiciled elsewhere in the EU, so long as it is expedient to do so, which

it normally will be (see, for example, *Re DTEK Finance Plc* [2017] BCC 165 and [2016] EWHC 3563 (Ch) at the convening and sanctioning stages).

61 In the present case, the evidence is that at least one Plan Creditor from each class is domiciled in the jurisdiction. Perhaps most importantly, so far as in terms of Trade Plan Creditors, it is 90 out of 168. In my view, this is amply sufficient to ensure that the requirements of Article 8 are satisfied.

62 The Company also relies on Article 25, which gives the court jurisdiction in the following circumstances:

> "*If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction …*".

I do not think that this is an appropriate basis for jurisdiction in the present case, for the simple reason that it does not seem to be the case that all Trade Plan Creditors have contracted with the Company on terms which include an English jurisdiction clause. The mere fact that some creditors have contracted on terms including such a clause is an unsafe foundation for the court to assume jurisdiction as against those creditors who have not.

63 Finally, I should turn to the practical issues to be considered in relation to the Explanatory Statement and the meetings themselves. As to the former, I am satisfied that the Explanatory Statement is in a form and style appropriate to the circumstances of the case and otherwise complies with para.14 of the Practice Statement. In saying that, I am not formally approving the Explanatory Statement and it remains open to any creditor to raise issues as to its adequacy at the sanction hearing if they wish to do so.

64 As to the further directions, I have run through the form of order with counsel and it suffices to say, for present purposes, that the proposal is for the meeting to be held on 25 August, which is twenty-one days from today. In my judgment, in light of the communication which has already taken place with the Plan Creditors and the tight timetable compelled by the urgent need to conclude a recapitalisation, that is sufficient notice.

65 I am also satisfied that this is a case in which it is appropriate for the meeting to be held virtually. The reasons which persuaded me that this was an appropriate course to adopt in *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) are equally valid in the present case. So far as the process itself is concerned, I simply repeat what I said at para.42 and 43 of my judgment in that case. During the course of this hearing, I have been through the proposals which the company has put forward in relation to the conduct of the meeting, which are described in Mr Weiss' witness statement, and I am satisfied that if those are complied with the creditors will have adequate opportunity to consult together such as to constitute the virtual meeting, a meeting, for the purposes of Part 26A.

66 The next point is that the evidence demonstrates that the Company has appointed Mr Weiss as its foreign representative for the purposes of seeking recognition of the Restructuring Plan under Chapter 15 of the US Bankruptcy Code. There is expert evidence which establishes that this relief is likely to be granted by the US Bankruptcy Court. For the reasons which are considered and discussed in *Telewest Communications Plc* [2004] BCC

342 at [60]-[61] and *Re Noble Group Ltd* [2019] BCC 349 at [165]-[170], I consider that it is appropriate to grant a declaration of the appointment to be made in this case.

67 Finally, I am asking to make an order pursuant to CPR 5.4D(2), that notice shall be given to the Company of any application made by a person to obtain a copy of a document from the court file. Whether or not this has become a standard order in Part 26 schemes, I am satisfied that there is sufficiently commercially sensitive material which has been put before the court to make such an order appropriate in the present case. The order does not prevent anyone from applying to inspect the court file. If such an application is made, the need to maintain confidentiality can be explored in more detail at that stage. In making the order, the court is simply requiring notice to be given to the Company of any such application.

68 In these circumstances, I shall make an order to convene the Restructuring Plan meetings in the terms which I have already discussed with counsel. Once it has been amended to deal with points in relation to the precise form that the virtual meeting shall take, I will approve it in the normal way.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge