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Claim No. CR-2022-001333

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

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

Date: 9 May 2022

Before:

THE HONOURABLE MR. JUSTICE MARCUS SMITH

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IN THE MATTER OF:

HAYA HOLCO 2 PLC

AND IN THE MATTER OF THE COMPANIES ACT 2006

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Mr. Daniel Bayfield, QC and **Mr Ryan Perkins** (instructed by **Linklaters LLP**) for the **Applicant**

Hearing date: 9 May 2022

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Approved Judgment

Mr. Justice Marcus Smith:

A. INTRODUCTION

1. Haya Holdco 2 plc (the **Company**) applies for an order giving the Company permission to convene a single meeting of certain of its creditors (the **Scheme Creditors**) for the purpose of considering and, if thought fit, approving a scheme of arrangement under Part 26 of the Companies Act 2006 (the **CA 2006**) (the **Scheme**).

2. The Company is incorporated in England. It is part of a group of companies (the **Group**) which specialises in the management of non-performing loans and real estate assets, many of which are located in Spain.

3. The Group's financial position has significantly deteriorated since 2017. The causes of the Group's financial difficulties include: the COVID-19 pandemic; additional competition within the market in which the Group operates; and the fact that the Group's revenues are principally derived from a relatively small number of contracts, some of which have not been renewed and some of which will need to be renewed in the near future.

4. The Scheme relates to two series of senior secured notes (the **Existing SSNs**), which have an aggregate principal amount of approximately €424 million and are due to mature on 15 November 2022. The ultimate beneficial owners of the Existing SSNs (the **Existing SSN Holders**) are the Scheme Creditors. The Existing SSNs were issued by a Spanish company called Haya Real Estate S.A.U. ("**HRE**"), and the Company recently acceded to the finance documents in respect of the Existing SSNs for the purposes of promulgating the Scheme. The Existing SSNs are governed by English law, the governing law having been changed from New York law for the purposes of promulgating the Scheme, a point I shall return to below.

5. Under the Scheme, the Existing SSNs will be redeemed in part, and the balance will be released. The Scheme Creditors will receive a package of consideration comprising: (i) newly issued notes (the **New SSNs**) equal to the balance of the Existing SSNs to be released; and (ii) shares in a new holding company of the Group representing 27.5% of the equity on a fully-diluted basis (the **New Shares**).

6. Absent the Scheme, it is the position of the Company that it is likely that the Company and HRE would enter into formal insolvency proceedings in England and Spain respectively. Such proceedings would, so I am told, provide a poor return for the Scheme Creditors (in the range of 33% to 80% of the total sums owing to them. This is according to an analysis carried out by Kroll Valuation Advisory Services (**Kroll**)). By contrast, if the Scheme is implemented, then it is considered that the Group will be restored to financial health so as to allow a materially greater return to the Scheme Creditors. Of course, these are informed predictions only, but it is easy to see why the Scheme is being promulgated.

7. The Company submits that: (i) the Court has jurisdiction in relation to the Scheme; and (ii) the Scheme Creditors should vote in a single class. The Court was therefore asked to make an order convening a single meeting of the Scheme Creditors (the **Scheme Meeting**). I heard the application to convene the Scheme Meeting on 9 May 2022 and

acceded to it, for reasons to be given in writing. These are those reasons. They drawn substantially on the very helpful written submissions I received from Mr. Bayfield, QC and Mr Perkins, who appeared on behalf of the Company.

8. In addition to the written submissions from the Company, I have read and considered:

(1) The first witness statement of Enrique Dancausa on behalf of the Company (**Dancausa 1**).

(2) The first witness statement of Paul Kamminga on behalf of the Information Agent (**Kamminga 1**).

(3) The **Explanatory Statement**. The Practice Statement issued by the High Court on 26 June 2020 provides that the Court will "consider the adequacy" of the Explanatory Statement to check that it is in an "appropriate form", but without approving its contents. Creditors were notified of the convening hearing pursuant to a Practice Statement Letter dated 11 April 202 (the **PSL**).

(4) The Scheme, which contain the essential terms of the arrangement that the Scheme Creditors will be asked to approve at the Scheme Meeting.

(5) The expert report of Professor Pedro De Miguel Asensio and Javier Castresana Oliver on the treatment of interest in a Spanish insolvency proceeding.

(6) The expert report of Daniel Glosband on New York law (**Glosband 1**), which explains why the Company's accession to the finance documents in respect of the Existing SSNs (and the change of governing law from New York law to English law) is valid as a **matter** of New York law.

B. BACKGROUND

9. The factual background is set out in Dancausa 1. The key points that emerge are summarised below.

10. The Company is incorporated in England. It is a wholly-owned subsidiary of Haya Holdco 1 Ltd (the **New Parent**). The Group consists of the New Parent and its subsidiaries. The Group is ultimately beneficially owned by investment funds managed and/or advised by Cerberus, a leading private investment firm.

11. HRE is the Group's main operating company. Its essential function is to manage a portfolio of non-performing loans (**NPLs**) and real estate owned assets (**REOs**). An REO is a class of property, typically owned by a lender, that failed to sell immediately after foreclosure. HRE manages such assets (as well as other financial and real estate assets) for a wide variety of clients, from financial institutions to international investors. Real estate services are delivered to a portfolio of approximately 186,000 assets under management (**AUM**). In total, as of December 2021, the Group was responsible for approximately €29.5 billion of AUM. The Group's key assets are its service level agreements (**SLAs**) with customers. Seven SLAs encompass approximately 95% of the Group's AUM.

12. The Group's debt structure is as follows. The Existing SSNs represent the Group's only material financial indebtedness. The Existing SSNs comprise two series of notes: the **Fixed Rate Notes**, which pay a fixed coupon of 5.25% per annum and have an aggregate principal amount of €214,925,000 plus accrued interest of €5,202,976; and the **Floating Rate Notes**, which pay a coupon at a floating rate of 5.125% over 3-month EURIBOR and have an aggregate principal amount of €209,025,000 plus accrued interest of €2,202,020.

13. The Existing SSNs are secured over a number of assets of the Group and are guaranteed by various companies within the Group. The Existing SSNs were originally issued by HRE, which is incorporated in Spain. As I described further below, the Company has now become a co-issuer in respect of the Existing SSNs.

14. The global spread of COVID-19 in early 2020 caused a general decline in economic activity in Spain, resulting in a significant negative impact on the Group's operations during 2020 and 2021. The pandemic caused a sharp reduction in REO transactions, as well as significantly reduced servicing fees. There were also Spanish regulatory changes as a result of the pandemic (such as restrictions on mortgage enforcement) which caused a slowdown in business in the NPL sector. Further, the pandemic caused certain financial institutions to delay or cancel the launch of new servicing contracts, which impacted upon the Group's ability to win new contracts.

15. One of the Group's key SLAs was not renewed by the customer, and some SLAs are due for renewal in the near future. The Group also faces additional competition for the services that it provides. As a result of these and other factors, the Existing SSNs are now trading at a significant discount to face value, and credit rating agencies have assessed the Existing SSNs as being subject to very high credit risk.

16. The Group has taken a number of steps aimed at maintaining its revenue and margin (including the formation of a new business plan). Whilst these steps allowed the Group to address its cost structure and to reduce its leverage to some extent, they were ultimately insufficient to address the deterioration of the Group's financial position.

17. In order to allow the Group to seek to agree renewals of various of its contracts, attempt to win new work and to see the long-term benefits of the implementation of the new business plan, the Group seeks to refinance the Existing SSNs in order to provide it with a stable operating platform and to ensure that HRE is not placed into an insolvency process.

18. Since November 2021, the Group has been engaged in discussions concerning the potential terms of the Scheme with a group of Existing SSN Holders who together hold Existing SSNs in excess of 60% of the aggregate outstanding principal amount of the Existing SSNs (the **Ad Hoc Group**). The Ad Hoc Group is represented by Latham & Watkins and PJT Partners.

19. On 18 February 2022, HRE entered into a lock-up agreement (the **Lock-Up Agreement**) with, among others, the members of the Ad Hoc Group (and/or their affiliates). The commercial terms of the Scheme are set out in a Term Sheet appended to the Lock-Up Agreement. The signatories to the Lock-Up Agreement are required to support the restructuring transaction and, if they are Scheme Creditors, to vote in favour of the Scheme (or, in the case of certain "Restricted Holders", to abstain from voting).

20. A number of Existing SSN Holders have acceded to the Lock-Up Agreement since February 2022. As matters stand, approximately 95.71% of the Existing SSN Holders (by value) have now signed the Lock-Up Agreement.

21. The Existing SSNs were issued pursuant to an indenture dated 15 November 2017 (the **Indenture**). Prior to the Supplemental Indenture, considered below, the Existing SSNs were governed by New York law and subject to the exclusive jurisdiction of the New York Court.

22. The Lock-Up Agreement contemplated that the restructuring of the Existing SSNs would be implemented by way of a scheme of arrangement under English law. Accordingly, in order to ensure that the English Court has jurisdiction to sanction the Scheme, HRE sought the consent of the Existing SSN Holders to make certain changes to the Indenture. In particular, HRE proposed to:

(1) Cause the Company to accede to the Indenture as a co-issuer of the Existing SSNs (such that the Company and HRE would be jointly and severally liable as primary obligors for all amounts due under the Existing SSNs).

(2) Amend the governing law provisions of the Indenture so that the Existing SSNs would be governed by English law rather than New York law.

(3) Amend the jurisdiction provisions of the Indenture so that the Existing SSNs would be subject to the exclusive jurisdiction of the English Court in relation to any proceedings commenced by an obligor of the Existing SSNs and the non-exclusive jurisdiction of the English Court in relation to any proceedings commenced by the Existing SSN Holders.

23. The consent request was put forward for the express purpose of enabling the Group to restructure the Existing SSNs by way of a scheme of arrangement in England.

24. The consent request was approved on 6 April 2022 by 91.5% of the Existing SSN Holders. As explained in the expert report of Glosband 1, this exceeded the consent threshold required amend the Indenture as a matter of New York law (in accordance with the contractual amendment provisions set out in the Indenture). A supplemental indenture was executed to give effect to the amendments (the **Supplemental Indenture**). As a result of the Supplemental Indenture, the Existing SSNs are now governed by English law and are subject to the jurisdiction of the English Court, and the Company is now a co-issuer of the Existing SSNs.

25. The Existing SSNs mature on 15 November 2022. Absent the Scheme, there is no viable proposal that would enable the Group to refinance the Existing SSNs prior to maturity. That being so, if the Scheme does not become effective, then it is likely that the Company and HRE will enter into formal insolvency proceedings in England and Spain respectively. The English insolvency proceedings in respect of the Company would be liquidation or administration, and the Spanish insolvency proceedings in respect of HRE would be *concurso* proceedings. The insolvency officeholders would seek to sell the business on an accelerated basis to a single purchaser – but this might not be possible, and the Group's assets may to be sold on a break-up basis. The purpose of the Scheme is to provide a better return to the Existing SSN Holders than they would receive in the event of an accelerated sales process.

C. THE SCHEME AND THE RESTRUCTURING

26. The Scheme is a compromise or arrangement of the rights attaching to the Existing SSNs. The Scheme Creditors are therefore the Existing SSN Holders.

27. The Existing SSNs are issued in the form of a **Global Note**. This means that a single global note is issued for the entire face value of each series of Existing SSNs.

28. Each Global Note is held by Elavon Financial Services DAC, UK Branch (the **Common Depositary**). Separate entities (namely GLAS Trust Corporation Limited and GLAS Trust Company LLC) have been appointed as the **Security Agent** and the **Note Trustee** in respect of the Existing SSNs.

29. Beneficial interests in each Permanent Global Note are traded through Euroclear and Clearstream (the **Clearing Systems**). The participants in the Clearing Systems maintain book-entry accounts to which interests in the Existing SSNs are credited. The participants in the Clearing Systems may be the beneficial owners of their interests in the notes and/or may hold their interests in the notes (in whole or in part) on behalf of the beneficial owner. The Existing SSN Holders are the ultimate beneficial owners of the Existing SSNs.

30. The Existing SSN Holders are contingent creditors for the sums due under the Existing Notes. This is because the Existing SSN Holders are entitled to call for the issuance of **Definitive Notes** in certain circumstances under the Existing SSN Indenture. Definitive Notes would include direct payment obligations owing by the Company to the Existing SSN Holders. It has been held in numerous cases that a beneficial owner who may obtain definitive notes is a contingent creditor for the purposes of the CA 2006: see e.g. Re Castle Holdco 4 Ltd [2009] EWHC 3919 (Ch) at [23] per Norris J; Re Co-operative Bank plc [2013] EWHC 4072 (Ch) at [23] per Hildyard J; and Re Noble Group Ltd [2019] BCC 349 (convening judgment) at [161]-[164] per Snowden J.

31. Accordingly, as with previous schemes of arrangement involving notes of a similar type, the Existing SSN Holders are treated as the Scheme Creditors for the purposes of compromising the Existing SSNs.

32. The Common Depositary, the Security Agent and the Note Trustee will execute deeds of undertaking (in the usual form) whereby they will agree to be bound by the Scheme. These will be included in the evidence for the sanction hearing.

33. The Scheme provides for:

(1) A partial redemption of the principal amount of the Existing SSNs (plus all accrued and unpaid interest outstanding on the Existing SSNs as at the date of the partial redemption) using excess cash available on the date upon which the Scheme becomes effective (estimated to be approximately €63 million).

(2) The release of the balance of the Existing SSNs.

(3) The issuance of new senior secured notes (the **New SSNs**) to the Existing SSN Holders in an amount equal to the released amount of the Existing SSNs.

(4) The transfer of ordinary shares representing 27.5% of the share capital of the New Parent (the **New Parent Shares**) to the Existing SSN Holders.

34. The New SSNs will carry an extended maturity date (30 September 2025), and the coupon on the New SSNs will be approximately 400 basis points higher than the coupon on the Existing SSNs. Each holder of the New SSNs will also receive a further closing payment equivalent to 0.50% of the principal amount of the New SSNs that it holds.

35. In order to give effect to the deal described above, the Scheme authorises the Company, the Security Trustee and the Information Agent to enter into certain various contractual documents (the **Recapitalisation Documents**) as agent and attorney on behalf of the Scheme Creditors. It has been held that a scheme of arrangement can be used to appoint an agent or attorney (including the scheme company itself) to execute contractual documents on behalf of a creditor for the purpose of implementing a financial restructuring: see e.g. Re ColourOz Investment 2 LLC [2020] BCC 926 at [74]-[75] per Snowden J.

36. The Scheme forms part of a wider transaction (the **Recapitalisation**) with a number of other components. Amongst other things, the Recapitalisation will involve the release of an upstream loan in the sum of €88.1 million plus accrued and unpaid interest owing to HRE by an entity called Promontoria Holding 62 BV. This is described in detail in the Explanatory Statement.

37. The Scheme will operate to discharge the claims of the Scheme Creditors against all of the obligors within the Group (including the Company and HRE as co-issuers of the Existing SSNs and the other guarantors of the Existing SSNs).

38. A scheme can compromise a creditor's claim against a third party (i.e. a person other than the scheme company) where such a compromise is "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": see Re Lehman Brothers International (Europe) (No 2) [2010] Bus LR 489 at [65] per Patten LJ; Re T&N Ltd [2007] Bus LR 1411 at [53] per David Richards J; Re La Seda de Barcelona [2010] EWHC 1364 (Ch) at [20]-[22] per Proudman J; and Re Magyar Telecom BV [2014] BCC 448 at [33] per David Richards J; Millett & Andrews, The Law of Guarantees (7th edition) at [10-002].

39. This principle is commonly invoked in the context of a scheme proposed by a borrower where other group companies have granted guarantees. Thus, if X is the borrower and Y is the guarantor, then X may propose a scheme to release the creditors' claims against both X (as borrower) and Y (as guarantor). Otherwise, the creditors would be entitled to sue Y under the guarantee, and Y would be entitled to claim the entire amount back from X in accordance with the guarantor's right of indemnity: Millett & Andrews, The Law of Guarantees (7th edition) at [10-002]. This "ricochet claim" would defeat the purpose of the scheme, since X would ultimately remain liable for the very amount that was purportedly released by the scheme. As Snowden J explained in Re Noble Group Ltd [2019] BCC 349 at [24] (sanction judgment):

> "It is well established that the court has jurisdiction under Pt 26 CA 2006 to sanction a scheme which includes a mechanism (usually the execution of a deed of release by an attorney appointed under the scheme) under which scheme creditors are required to release claims against third parties where such a release

> is necessary in order to give effect to the arrangement between the company and the scheme creditors. That test is most clearly satisfied where the scheme compromises debts which are guaranteed and where, absent such a release, pursuit of the guarantor by a scheme creditor would undermine the compromise between the creditor and the company: see Re Lehman Brothers International (Europe) (No.2) [2009] EWCA Civ 1161; [2010] Bus. L.R. 489; [2010] B.C.C. 272 at [65] (Patten LJ)."

See also: Re APCOA Parking Holdings GmbH [2015] Bus LR 374 at [149] per Hildyard J; Re Lecta Paper UK Ltd [2020] EWHC 382 (Ch) at [21] per Trower J; Re Codere Finance 2 (UK) Ltd [2020] EWHC 2441 (Ch) at [138] per Falk J.

40. In both Re Lecta and Re Codere, the scheme was proposed by a company which had recently acceded to the relevant series of notes as a co-issuer (as in the present case). The same structure has been adopted and approved by the Court in other cases: see e.g. Re Gategroup Guarantee Ltd [2021] BCC 549 at [163] per Zacaroli J. I accept that I have jurisdiction to sanction a scheme which provides for the release of the Existing SSNs as against all obligors within the Group.

41. Finally, it should be noted that the Recapitalisation Documents include three **Deeds of Release**, which provide (among other things) for a customary release of the professional advisers to the Group, the directors of various Group companies and other persons involved in the Scheme from any liability arising out of the negotiation and implementation of the transaction. This is a type of provision which was approved by Snowden J in Re Far East Capital Ltd SA [2017] EWHC 2878 (Ch) at [13]-[14] and Re Noble Group Ltd [2019] BCC 349 (sanction judgment) at [20]-[30].

D. THE CONVENING HEARING

42. Section 896(1) of the CA 2006 provides:

> "The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs."

43. The procedure for a convening hearing under Part 26 or Part 26A of the CA 2006 is governed by the Practice Statement issued by the Chancellor of the High Court on 26 June 2020 (**Practice Statement**). In summary, the Practice Statement provides that:

(1) The applicant should draw to the attention of the Court as soon as possible any issues which may arise as to the constitution of meetings of creditors, and any issues as to the existence of the Court's jurisdiction to sanction the scheme.

(2) For this purpose, unless there are good reasons for not doing so, the applicant should take all reasonable steps to notify any person affected by the scheme that it is being promoted, the purpose which the scheme is designed to achieve, the meetings of creditors which the applicant considers will be appropriate and their composition.

(3) Notice should be given in sufficient time to enable those affected by the scheme to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps which have been taken to give the notification and what, if any, response the applicant has had to the notification.

(4) If a person fails to raise an issue of class composition at the convening hearing and seeks to raise the issue at the sanction hearing, the Court will "expect them to show good reason why they did not raise the issue at an earlier stage". In this regard, it has been held that a reasoned determination by the Court of any matter relating to class composition or jurisdiction at the convening hearing has obvious advisory value (particularly if it is accompanied by a reasoned judgment) but is not binding on the Court at the sanction hearing: see Re APCOA Parking (UK) Ltd [2014] Bus LR 1358 at [15]-[17] per Hildyard J.

44. The function of the Court at the convening hearing is "emphatically not" to consider the merits or fairness of the proposed scheme, which will arise for consideration at the future sanction hearing if the scheme is approved by the statutory majority of creditors: see Re Telewest Communications plc [2004] BCC 342 at [14] per David Richards J and Re Indah Kiat International Finance Co BV [2016] BCC 418 at [39]-[42] per Snowden J.

45. The Practice Statement contemplates that creditors will be given notice of the convening hearing. The appropriate period of notice is a fact-sensitive matter, and has been considered in a number of cases: Re House of Fraser (Funding) plc [2018] EWHC 1906 (Ch) at [20] per Birss J; Re NN2 Newco Ltd [2019] EWHC 1917 (Ch) at [22] per Norris J; Re ColourOz Investment 2 LLC [2020] BCC 926 at [46]-[48] per Snowden J; Re Selecta Finance UK Ltd [2020] EWHC 2689 (Ch) at [37]-[41] per Adam Johnson J.

46. In Re NN2 Newco Ltd [2019] EWHC 1917 (Ch) at [22], Norris J identified three relevant factors in deciding whether the period of notification is adequate: (i) the complexity of the scheme; (ii) the degree of consultation with creditors prior to the launch of the scheme; and (iii) the urgency of the scheme having regard to the financial distress of the company.

47. In the present case, the PSL was issued on 11 April 2022. It was circulated to the Scheme Creditors through the Clearing Systems (which is the standard method of notifying noteholders of a convening hearing). The Scheme Creditors have therefore had four weeks' notice of the convening hearing. Moreover, the Scheme Creditors have been aware of the key commercial terms of the Scheme for much longer than four weeks. The Lock-Up Agreement, including the Term Sheet appended thereto, has been available to the Scheme Creditors since February 2022, and numerous announcements regarding the Scheme have been published. The Scheme Creditors were also made of the Scheme via the consent solicitation process, which was initiated by way of a notice issued on 30 March 2022.

48. It was accepted by the Company that this is not a case of extreme urgency, but it is plainly appropriate for the Group to resolve its financial difficulties as soon as possible and well in advance of the maturity of the Existing SSNs in November 2022. The Scheme is no more complex than other similar restructurings of a comparable value, and there are no difficult issues of jurisdiction or class composition that fall to be determined at the

convening hearing. In all the circumstances, the Scheme Creditors have been given sufficient notice of the convening hearing.

E. JURISDICTION

49. At the convening hearing, the Court may "indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are other factors which would unquestionably lead the court to refuse to exercise its discretion to sanction the scheme": see Re Noble Group Ltd [2019] BCC 349 (convening judgment) at [76] per Snowden J.

50. Thus, the jurisdictional issues to be considered at the convening hearing are relatively narrow. Two topics fall to be considered at the convening hearing:

(1) Is the Company a "company" as defined in Part 26 of the CA 2006?

(2) Is the Scheme a "compromise or arrangement" between the Company and its creditors (or any class(es) of them)?

I consider these points in turn below.

51. As to the first point, Part 26 of the CA 2006 applies to a "company". For these purposes, "company" means a company liable to be wound up under the Insolvency Act 1986: see section 859(2)(b) of the CA 2006.

52. In the present case, the Company is incorporated in England and is therefore liable to be wound up under the Insolvency Act 1986. It follows that the Company is a "company" as defined in section 895(2)(b) of the CA 2006. Given that the Company is incorporated in England, there is no need to establish any further "sufficient connection": see Re Dundee Pikco Ltd [2020] EWHC 89 (Ch) at [24] per Zacaroli J.

53. In any event, the Existing SSNs are governed by English law. That being so, sufficient connection is likely to exist, should it be necessary to establish one, in any event. In the case of a foreign company, a sufficient connection with England will be established if the liabilities compromised by the scheme are governed by English law: see Re Vietnam Shipbuilding Industry Group [2014] BCC 433 at [6]-[9] per David Richards J. I say no more about this, since this will be a matter for the sanction hearing, as it goes to the discretion of the Court, rather than the existence of jurisdiction.

54. Prior to the execution of the Supplemental Indenture, the position was different. At that stage, HRE was the sole issuer of the Existing SSNs. HRE is incorporated in Spain. Moreover, the Existing SSNs were governed by New York law. If HRE had sought to propose a scheme of arrangement under Part 26 of the CA 2006, it may well have been unable to establish a sufficient connection with England.

55. However, pursuant to the Supplemental Indenture, the Company became a co-issuer of the Existing SSNs (and thereby became jointly and severally liable for all amounts owing under the Existing SSNs). In addition, the governing law was changed from New York law to English law. These changes have enabled the Company (rather than HRE) to propose the Scheme and have eliminated any jurisdictional difficulties that might otherwise have arisen.

56. The authorities establish that it is permissible to take steps which are intended to confer jurisdiction on the English Court for the purposes of a scheme. By way of example: Re APCOA Parking Holdings GmbH [2015] Bus LR 374; Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch); Re NN2 Newco Ltd [2019] EWHC 1917 (Ch).

57. The structure of the Scheme (including the manner in which the Company became a co-issuer of the Existing SSNs and the change of governing law) does not, in my judgement, give rise to any jurisdictional roadblock. To the extent that the structure gives rise to any wider question of discretion, that is of course a matter to be determined at the sanction hearing, and I say no more on the point.

58. As to the second point, Part 26 of the CA 2006 empowers the Court to sanction a compromise or arrangement between a company and its creditors (or any class or classes of them). It has been held that the word "arrangement" should be construed in a very broad manner: Re Savoy Hotel Ltd [1981] Ch 351; Re Lehman Brothers International (Europe) [2010] Bus LR 489 at [45]; Re Lehman Brothers International (Europe) [2019] BCC 115 at [64].

59. In the present case, the Scheme in my judgment involves the requisite element of "give and take". Under the Scheme, the Existing SSNs will be redeemed in part, and the balance will be released. The Scheme Creditors will receive a package of consideration comprising the New SSNs and New Shares. Accordingly, the Scheme falls within the concept of a compromise or arrangement between a company and a class of its creditors.

F. CLASS COMPOSITION

60. I turn to consider the question of the appropriate class composition.

61. The basic rule is that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 (Bowen LJ) and Re UDL Holdings Ltd [2002] 1 HKC 172 at [27] (Lord Millett NPJ).

62. When dividing creditors or members into classes, two considerations are relevant: the rights that the creditors or members would have if the scheme were not implemented, and the rights that the creditors or members would have if the scheme were implemented. As Chadwick LJ said in Re Hawk Insurance Co 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."

63. The likely alternative to a scheme of arrangement is often called the comparator. In Re Stronghold Insurance Co Ltd [2019] 2 BCLC 11 at [48]-[49], Hildyard J described the importance of the comparator as follows:

> "What is now ordinarily adopted as the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed. In Re British Aviation Insurance Co Ltd [2006] 1 BCLC 665; [2005] EWHC 1621 (Ch), Lewison J (as he then was) considered this to be "critical to deciding whether all the

> policyholders form a single class"; and in Re Apcoa Parking (UK) Ltd [2014] EWHC 997 (Ch) I agreed that "that will necessarily inform, and in many if not most cases be the most important factor in, the discussions".
>
> The reason is two-fold. First, a fair comparison between a policyholder's rights if there is no scheme and its rights under the proposed scheme depends on ascertaining the nature and quality of the right in the "non-scheme world", and the latter depends on the appropriate comparator. Secondly, only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights be weighed fairly."

64. It is the legal rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests can be taken into account when considering whether, as a matter of discretion, to sanction the scheme: see Lord Millett NPJ's judgment in Re UDL at 184-5.

65. Hildyard J provided the following summary of the law in Re Primacom Holding GmbH [2013] BCC 201 at [44]-[45]:

> "…The golden thread of these authorities, as I see it, is to emphasise time and again … [that] in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing and the rights offered in the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.
>
> I emphasise this point because it … enables the court to take a far more robust view as to what the classes should be and to determine a far less fragmented structure than if interests were taken into account."

66. When deciding whether creditors with different rights should vote in a single class, one question that the Court often asks is whether there is "more to unite than to divide" the relevant creditors. The phrase "more to unite than to divide" is ultimately derived from the decision of David Richards J in Re Telewest Communications plc [2004] BCC 342 at [40]. In Re APCOA Parking Holdings GmbH [2015] Bus LR 374 at [52], Hildyard J said:

> "The modern approach...is to break the question into two parts, and ask first whether there is any difference between the creditors in point of strict legal right...and if there is, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous motivation operating in the case of any particular creditor(s)."

67. 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": Re Telewest Communications plc [2004]

BCC 342 at 354 per David Richards J; Re Lehman Brothers International (Europe) [2019] Bus LR 1012 at [70], Hildyard J said:

> "… a material difference in legal rights does not necessarily preclude their respective holders from being included in a single class: for the second part of the test enables that provided that they are not "so dissimilar as to make it impossible for them to consult together with a view to their common interest". That, unusually and perhaps confusingly, introduces into a jurisdictional issue a subjective assessment, which may account for changing judicial perceptions over the years as to class constitution in the light of the developing and prevailing inclination of judges to recognise the dangers of giving a veto to a minority group …" (emphasis added)

68. In considering class composition, it is important to avoid unnecessary or inappropriate proliferation of classes, for that can give rise to indefensible "vetos" to the scheme in question. This policy has been highlighted in a number of authorities: Re Anglo American Insurance Co Ltd [2001] 1 BCLC 755 at 764 per Neuberger J; Re Hawk Insurance Co Ltd [2001] BCLC 480 at [33] per Chadwick LJ; Re UDL Holdings Ltd [2002] 1 HKC 172 at 183-184 per Lord Millett; Re APCOA Parking Holdings GmbH (No. 2) [2015] Bus LR 374 at [54] per Hildyard J.

69. It is important to be context sensitive to differences that are and are not material. For instance, Mr Bayfield raised the question of whether participation in the Scheme might be affected by sanctions arising out of the Ukraine invasion. It was not clear to him that there was such an issue, but it seems to me clear that this would be an unsound basis for fracturing a single class: *cf* Re ColourOz Investment 2 LLC [2020] BCC 926 at [110] per Snowden J, where even a material difference did not serve to fracture the class.

70. In the present case, it is my judgment that the Scheme Creditors should vote in a single class. I bear in mind that no Scheme Creditor contends to the contrary. The comparator to the Scheme performs an important role in the analysis of class composition. The evidence before me shows that, if the Scheme is not implemented, then it is likely that the Company and HRE will enter into formal insolvency proceedings in England and Spain respectively. In formal insolvency proceeding in England or Spain, the Scheme Creditors would have the same legal rights against the Company and HRE (as applicable). In particular, the Scheme Creditors would have secured claims against the same secured assets and unsecured claims against the Company and HRE for the shortfall following the realisation of the security. Their legal rights would be identical, and they would receive the same rateable return. Under the Scheme, the Scheme Creditors will receive the same commercial deal. Each Scheme Creditor will be entitled to receive the same package of consideration *pro rata* to their existing claims (comprising a partial redemption payment on the Existing SSNs, an allocation of New SSNs and shares in a new holding company of the Group). In those circumstances, it is clear to me that the Scheme Creditors should vote in a single class.

71. This conclusion is strengthened by the difference between the "comparator outcome" and the "Scheme outcome". As to this:

(1) The Company engaged Kroll to advise on the likely return that the Scheme Creditors would receive in a formal insolvency proceeding. According to Kroll, the estimated return is in the range of 58% to 80% of the total sums outstanding. This assumes that it would be possible to sell the business on an accelerated basis within

the Spanish insolvency proceedings of HRE. If an accelerated sale of the business cannot be achieved and the assets are instead sold on a break-up basis, then the returns will be even lower (in the range of 33% to 55%).

(2) By contrast, if the Scheme becomes effective (such that the business is able to continue operating in accordance with the Group's business plan), this will allow the Group to ensure the ongoing payment of the coupon under the New SSNs beyond March 2022 and will thereby maximise the chances of the successful implementation of the business plan and the repayment of the New SSNs in full at maturity. In addition, the Scheme Creditors will receive an immediate partial redemption payment on the Existing SSNs and will obtain a minority equity interest in the Group, which will enable them to share in any future increase in the value of the business. Viewed as a whole, these benefits are far preferable to the expected returns in the comparator to the Scheme. Accordingly, there is more to unite the Scheme Creditors than to divide them.

72. In argument, the Company identified seven matters which could be said to give rise to a potential class issue. I conclude that none of these matters fractures the class (individually or collectively). I list these factors, and my reasoning, below:

(1) Different interest rates. The Floating Rate Notes have a floating rate of interest (namely 5.25% per annum), whereas the Fixed Rate Notes have a fixed rate of interest (namely 5.125% over 3-month EURIBOR). There are many cases in which the Court has held that interest rate differences do not fracture the class in the context of a scheme where the comparator is a formal insolvency proceeding. As Zacaroli J said in Re ED&F Man Treasury Management plc [2020] EWHC 2290 (Ch) at [11]:

"In this case, as I have explained, the appropriate comparator is a formal insolvency process, most likely in the form of a distributing administration. In such an administration, the rights of all the relevant creditors would be the same. They hold unsecured claims against the Company and thus would rank pari passu with each other for a dividend or dividends from the insolvent estate, payable at the same time for all. It is irrelevant that the contractual terms as to interest and maturity dates under the existing facilities and notes differ as between different creditors. No interest accruing post-commencement is payable on debts unless there is a surplus having paid all proved debts, which is not a practical likelihood here. As I have noted, all dividends are payable at the same time, irrespective of the contractual date for payment of the proved debt."

(2) See also: Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [26]-[27] per Adam Johnson J. The expert evidence of Spanish law explains that no post-insolvency interest would be recoverable if the principal debt is not repaid in full, which is the expected outcome in the present case. It follows that the apparent differences between the existing contractual rights of the Scheme Creditors (as regards interest rates) are irrelevant. In substance, they have the same rights. It is therefore appropriate for them to be given the same rights under the Scheme (namely the New SSNs).

(3) Customary confirmations. Scheme Creditors will be required to make certain customary confirmations with respect to US securities legislation in order to certify

their ability to receive their allocation of New SSNs and New Shares. If a Scheme Creditor is unable to make such customary confirmations, it may nominate a person to receive its allocation of New SSNs and New Shares on its behalf. If a Scheme Creditor fails to nominate such a person, then the New SSNs and New Shares for that Scheme Creditor will be transferred into a "holding trust" for up to 12 months. If the New SSNs and New Shares still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant creditor. This structure does not, in my judgment, fracture the class. It is a customary feature of schemes that involve the issuance of new debt or equity securities. The Scheme Creditors have the same rights in relation to the New SSNs and New Shares under the Scheme. An inability to give the customary confirmations required to be given to receive an allocation of New SSNs and New Shares goes merely to the enjoyment of those rights, creating a potential fairness, not class, issue: see Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19] per Zacaroli J; Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [28] per Adam Johnson J; Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [82]-[83] per Trower J.

(4) Consent Payment. A consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 5pm on 31 March 2022 (the **Consent Payment**). The Consent Payment is a sum equal to 0.5% of the principal amount of the New SSNs to be received by the relevant Scheme Creditor under the Scheme. The Consent Payment will be payable in cash upon the implementation of the Scheme. Consent fees of this type are common, and at this level do not – given the value at risk - fracture the proposed class. Of course, this is a matter that is fact dependent, and the fees incurred in bringing forward a scheme, and the basis on which they are to be paid, are always going to be matters the court ought to bear in mind. More specifically:

(a) Some of the authorities suggest that, where a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class: see Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [72] per Trower J, among many other cases. I am a little doubtful as to the weight of this point, since the critical question is how the class will vote at the meeting, and the factors that might impair that vote.

(b) Some of the authorities suggest that even if a consent fee was made available to all, it is necessary to consider whether the quantum of the consent fee is material. On this view, if a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator to the scheme and the value of the rights conferred by the scheme), then the fee does not fracture the class: see Re Primacom Holding GmbH [2013] BCC 201 at [57] per Hildyard J, among other cases.

It is this, second, factor that is persuasive – at least in the present case, although I would be troubled if the potential for a consent fee were not available to all members of the class. To that extent, selectivity may be a negative factor, requiring of explanation. In the present case, all of the financial creditors were given an

opportunity to sign the Lock-Up Agreement and receive the Consent Payment (if they acceded by 5pm on 31 March 2022). More importantly, the Consent Payment (which represents only 0.5% of the New SSNs to be received by the relevant Scheme Creditor) would not, in my judgment, exert a material influence on the Scheme Creditors' voting decisions. The difference between the "Scheme outcome" and the "comparator outcome" is far greater than 0.5% and it would be fanciful to suppose that anyone would vote for the Scheme in order to receive the Consent Payment.

(5) Advisers' fees. The legal and financial advisers to the Ad Hoc Group have carried out a significant amount of work to assist in devising the transaction structure and drafting the restructuring documents (which are lengthy and complex). The fees, costs and expenses incurred by the legal and financial advisers to the Ad Hoc Group in connection with the Scheme will be met by the Group in accordance with certain fee letters entered into by the applicable parties. Again, the key question is whether the payment of the fees may distort the process of obtaining the informed consent of the class. In many previous cases, it has been found that the payment of fees incurred by a creditor's professional advisers does not fracture the class. Often, such fees fall into a different category from consent fees, since they do not confer any bounty or net benefit on the relevant creditor: they simply defray expenses and disbursements that a creditor has incurred as a result of the restructuring transaction and would not otherwise have incurred. See Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [18] per Zacaroli J; Re ColourOz Investment 2 LLC [2020] BCC 926 at [113] per Snowden J; Re ED&F Man Treasury Management plc [2020] EWHC 2290 (Ch) at [13] per Zacaroli J; and Re Codere Finance 2 (UK) Ltd [2020] EWHC 2441 (Ch) at [68]-[69] and [101]-[104] per Falk J. In this case, In addition, any "benefit" arising from the payment of professional fees is *de minimis* in comparison to the wider benefits of the Scheme. In my judgment, in this case, no class issue arises.

(6) Work Fee. The Lock-Up Agreement provides that a fee of €250,000 (the **Work Fee**) will be paid to each member of the Ad Hoc Group (subject to an aggregate cap of €1,250,000) to compensate the members of the Ad Hoc Group for their assistance and endeavours in structuring and negotiating the terms of the Scheme. The Work Fee is also paid to compensate the members of the Ad Hoc Group for their inability to trade the Existing SSNs for a substantial period of time when the Scheme was being negotiated (since they had access to confidential information which had not yet been disclosed to the market), which resulted in a loss of trading opportunities. Work fees are not uncommon in schemes of arrangement, and in previous cases, they have not caused the class to fracture: Re DTEK Finance plc [2017] BCC 165 at [7] per Newey J; Re Far East Capital Ltd SA [2017] EWHC 2878 (Ch) per Snowden J; Re Bibby Offshore Services plc [2017] EWHC 3402 (Ch) at [26]-[27] per Arnold J; Re Noble Group Ltd [2019] BCC 349 at [121], [141] and [142] per Snowden J; Re NN2 Newco Ltd [2019] EWHC 1917 (Ch) at [46] per Norris J; Re Codere Finance 2 (UK) Ltd [2020] EWHC 2441 (Ch) per Falk J; Re KCA Deutag UK Finance plc [2020] EWHC 2779 (Ch) per Trower J; Re Petra Diamonds US$ Treasury plc [2020] EWHC 3565 (Ch) per Sir Alastair Norris. I do not consider this case to be any different, and find that the Work Fee does not fracture the class. There are two key points in this regard. First, the Work Fee is very small in comparison to the benefits of the Scheme, and far smaller than the

work fees charged in other cases. Second, the Work Fee is paid in consideration of the work carried out by the Ad Hoc Group, which requires significant time to be spent by senior management at the relevant creditor entities, and in consideration of their inability to trade the Existing SSNs during the period when the Scheme was being negotiated. The Work Fee is not a form of bounty or disguised consideration, but is simply a fee for a commercial service that benefited all Scheme Creditors by enabling the Scheme to be negotiated and implemented.

(7) Nomination rights. The members of the Ad Hoc Group are entitled to nominate the initial two independent non-executive directors to be appointed by the holders of Class B Shares on the Recapitalisation Effective Date to the board of the New Parent (the **Initial Class B Shareholder Directors**). In my judgment, this does not fracture the class. The Ad Hoc Group has the right to nominate two Initial Class B Shareholder Directors on the Recapitalisation Effective Date for administrative purposes only. The Class B Shareholder Directors will be independent directors, rather than representatives of or otherwise associated with any member of the Ad Hoc Group, and their appointment would not give the Ad Hoc Group any additional rights regarding the management of the New Parent. As the Company and its advisers are currently in contact and negotiating the Recapitalisation with the Ad Hoc Group and their advisers, the Group considered it efficient and appropriate for the Ad Hoc Group to appoint the Initial Class B Shareholder Directors. In the event that the remaining Class B Shareholders disagree with the Ad Hoc Group's selection of the Initial Class B Shareholder Directors, they are able to replace them after the Recapitalisation Effective Date. This is not, in my judgment, a material difference in rights which fractures the class. This is consistent with authorities in which similar (and more extensive) nomination rights were conferred on an ad hoc group or coordinating committee, e.g. Re Pizza Express Financing 2 Ltd [2020] EWHC 2873 (Ch) at [44] per Sir Alastair Norris and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [71] per Trower J.

(8) Information access. In Re Port Finance Investment Ltd [2021] EWHC 378 (Ch) at [101], Snowden J said:

> "Without further explanation, I also initially was concerned that the Group might be planning to allow (and indeed pay for) what was described as "due diligence" to be carried out by the Financial Adviser for the benefit of certain Noteholders rather than others. The scheme process and the formulation of classes depends on an assumption that all creditors who attend and vote in a class meeting should do so on the basis that the necessary information has been provided to them all in the same explanatory statement. Even if not within the conventional class test based on a comparison of rights, I think it would be highly relevant to the question of whether the court ought to convene a single class meeting on the basis of the proposed explanatory statement if there was also to be a parallel process for provision of additional information to some, but not all, creditors: see the similar concerns I expressed in re Sunbird Business Services Limited [2020] EWHC 2493 (Ch); [2020] Bus LR 2371."

This concern does not arise in the present case. To ensure members of the Ad Hoc Group were not placed at an advantage over other Scheme Creditors, the following safeguards were implemented:

(a) Prior to sharing any material with members of the Ad Hoc Group, HRE signed a non-disclosure agreement with each member of the Ad Hoc Group. This contained a "cleansing mechanics" clause by which the Company was obliged to "cleanse" any material non-public information that had been provided to the Ad Hoc Group (by making that information public).

(b) Accordingly, on 18 February 2022, HRE published an announcement including all material terms of the transaction. HRE also published a "cleansing presentation", which includes all material operative and financial information that had been shared with the Ad Hoc Group during the negotiation process.

(c) Finally, the Explanatory Statement includes detailed information as to the Group's financial position. It will be provided to all Scheme Creditors and will ensure that there is no material inequality of information.

G. DISPOSITION

73. It is appropriate that an order convening the Scheme Meeting be made, for the reasons I have given.

74. I was provided with a draft order setting out the proposed directions as to the summoning and conduct of the Scheme Meeting. There is no point is setting out the terms of the draft convening order. I have made an order in substantially those terms.