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Gategroup Restructuring Plan: Meetings Convened with Separate Class for Bondholders

By David Ereira & Crispin Daly

Summary

- Zacaroli J of the English High Court has handed down his decision in respect of the proposal to gategroup Guarantee Limited, part of the Swiss airline caterer gategroup to restructure its debts by way of a restructuring plan under Part 26A of the Companies Act 2006.
- The Judge has ordered that meetings of creditors be convened, although he has declined to treat senior lenders and bondholders as a single class and has instead ordered separate class meetings for each.
- Paul Hastings acted for one of the affected bondholders in initially objecting to the restructuring plan. The bondholder later agreed to support the restructuring plan following agreement to amend aspects of the plan.
- Zacaroli J in any event considered the issues raised in making his decision.

Background

In June 2020 the UK Government enacted emergency insolvency and restructuring legislation to alleviate the burden of companies suffering financially from the impact of COVID-19. The Corporate Governance and Insolvency Act 2020 introduced both permanent and temporary measures of which one of the most important permanent measures is the introduction to the Companies Act 2006 of Part 26A ("Part 26A"), which creates a new debtor-in-possession tool for companies to restructure themselves referred to as a restructuring plan. A restructuring plan is similar in many respects to the existing UK scheme of arrangement, requiring two court hearings, the first to establish if a meeting with creditors for voting purposes should be convened and the second to sanction the plan if approved. The key differences with a restructuring plan from a scheme of arrangement are that (i) a company must be in "financial difficulties" to propose a restructuring plan; and (ii) dissenting classes of creditor can be "crammed down" by other classes of creditor in certain circumstances.

To date, there have only been four restructuring plans to come before the English High Court. Of these the first three (Virgin Atlantic, Pizza Express and Deep Ocean) were unopposed. The Fourth, in respect of a subsidiary of the Swiss airline caterer gategroup (the "Group"), was initially opposed by one of the affected bondholders, a fund, represented by Paul Hastings (the "Fund").

The Restructuring

Due to the impact of COVID-19 on the air travel industry, the Group sought additional financing from its ultimate shareholders (the "Shareholders"). The Shareholders agreed to an injection of new

money on condition that obligations due to the Group's existing creditors be deferred by extending the relevant maturity dates by five years.

The existing unsecured liabilities of the Group included (i) a term and revolving facility loan amounting to approximately CHF 660 million (the "Loan") owed to a group of banks (the "Senior Lenders"), guaranteed by a number of companies within the Group; and (ii) CHF 350 million 3% bonds (the "Bonds"), governed by Swiss law, issued by Gategroup Finance (Luxembourg) S.A. (the "Issuer") and guaranteed by gategroup Holding AG (the "Parent"). The Bonds were issued in small denominations and are understood to be held mostly by Swiss retail investors.

Following extensive discussions with the Senior Lenders the Group, the Shareholders and the Senior Lenders agreed to the proposed extension of the maturity date for the Loan and the terms of the injection of the new money from the Shareholders, entering into a lock up agreement. The Group did not consult with the holders of the Bonds (the "Bondholders") on the basis that the holders themselves were a diverse group and their identities were unknown.

The Plan

The Group incorporated a new English company, gategroup Guarantee Limited (the "Company"), which entered into a deed poll (the "Deed Poll"), unilaterally assuming all of the liabilities of the Parent and the Issuer. On the basis of those assumed liabilities, and the consequent financial difficulties it created for the Company (which has no assets), the Company applied to the English High Court for leave to convene a meeting of creditors to approve a restructuring plan by which the amendments to the maturity dates of the Bonds and the Loan could be made and new money injected (the "Plan").

The Company stated in its submissions that the alternative to the Plan would be insolvent liquidation of the Group and that recovery for all creditors in the counterfactual scenario would likely be much lower than if the Plan were implemented. The Company proposed that the Senior Lenders and the Bondholders should vote as a single class, due to the differences between the rights of the respective creditors, which were not so substantial as to make them unable to consult together.

On 11 December 2020 the Company issued a practice statement letter (the "PSL"), which was made available to the Bondholders, setting out an outline of the Plan and giving notice that there would be a hearing on 15 January 2021 for the Court to decide whether to order that the creditors' meeting to approve the Plan should be convened.

Opposition to the Plan

The Fund, who owns over 10% of the Bonds, initially opposed the Plan on the basis that the information provided in the PSL was insufficient to determine whether the Plan was in its best interests as a Bondholder. In particular, the PSL made reference to several documents that had evidently been shared with and approved by the Senior Lenders, but which the Company had not made available to Bondholders.

On the Fund's instructions, Paul Hastings firstly attempted to obtain further information from the Company and sought a delay to the convening hearing, so as to have sufficient time to consider such information. The Company refused on both counts, so Paul Hastings filed submissions with the Court complaining of the lack of information available to the Bondholders and raising a number of preliminary issues that did not appear to have been addressed by the Company in the Plan, including the following:

- how the Company fulfils the entry criteria for a restructuring plan under Part 26A when the only financial difficulties it faces are those voluntarily assumed under the Deed Poll;

- whether a Group creditor will remain a creditor of the Company if it disclaims the Deed Poll under which the liabilities of the Company arise;
- whether a Group creditor can still be bound by the Plan is not a creditor of the Company;
- whether the English Court has jurisdiction to sanction the Plan in such a way that it would be recognised by courts in Luxembourg and Switzerland (where the Issuer and Parent respectively are incorporated); and
- whether the Senior Lenders and Bondholders should vote in a single class when the Bondholders are effectively structurally subordinated to the Senior Lenders.

As a result of the submissions filed in opposition to the Plan prior to the convening hearing, Trower J ordered the convening hearing to be vacated from 15 January and heard instead on 3-4 February 2021.

The Fund Withdraws Opposition to the Plan

On being provided with the necessary information and time to consider the economic impact of the Plan and the relevant alternative, the Fund formed the view that the Plan was likely to be in the best interests of all creditors including Bondholders.

At the Fund's request, the Company made some alterations to the Plan documents and agreed to meet the Fund's legal costs of making submissions to date. The Fund then withdrew its opposition and wrote to the Company indicating its support for the Plan.

The points raised by the Fund still fell to be considered by the Court at the rescheduled convening hearing in relation to whether it should make the order to convene the meeting of a single class of Plan creditors as requested by the Company.

Decision

Zacaroli J handed down his initial decision on 11 February 2021, in which he ruled that the Plan should proceed to the creditor approval stage. However, he was not satisfied that the Senior Lenders and the Bondholders had sufficient commonality of interest and ordered that two classes should be formed. Meetings of those two creditor classes will take place, most likely around mid-March.

A full judgment with reasons will follow.

Comment

The Judge's decision to fracture the proposed single class of creditors proposed by the Company is unusual as the tendency of the English courts is to find more to unite creditors' interests than to divide them. Whilst we will have to wait for the reasoned judgment, it seems likely that the points raised by the Fund in relation to the very different interests of the Senior Lenders and the Bondholders have been persuasive in relation to the question of class composition.

The effect is that the Bondholders will have the opportunity to approve the Plan, already agreed by the Senior Lenders, for themselves based on the Plan's own merits. The Fund was able to obtain sufficient financial information to make an informed decision on the Plan and negotiate necessary amendments, whilst recovering its legal costs of doing so.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings London lawyers:

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