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Claim Nos. 4317, 4318, 4319, 4320, 4321 and 4322 of 2015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 22 July 2015

Before:

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF

(1) VAN GANSEWINKEL GROEP B.V.
(2) VAN GANSEWINKEL NEDERLAND B.V.
(3) ROBESTA VASTGOED B.V.
(4) RIEBEECK OLIE AMSTERDAM 1 B.V.
(5) VAN GANSEWINKEL BELGIE NV
(6) VAN GANSEWINKEL INDUSTRIE B.V.

Applicants

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

David Allison QC (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Applicants**

Hearing date: 14 July 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

Introduction

1. On Tuesday 14 July 2015, after a hearing lasting most of the day, I made an order sanctioning schemes of arrangement under Part 26 of the Companies Act 2006 ("the Schemes") in respect of five Dutch companies and one Belgian company in the group headed by Van Gansewinkel Groep B.V. ("the Scheme Companies" and "the Group"). The Scheme Companies do not have their centre of main interests (COMI), or any establishment, or any significant assets in England. The Schemes are part of a restructuring of the Group's financial indebtedness, the terms of which are governed by English law. The restructuring was urgently needed as the Group was unable to comply with its financial covenants under its existing financing agreements and was operating pursuant to limited waivers and forbearances from its creditors.

2. When I made the order sanctioning the Schemes, I indicated that I would give my reasons in writing at a later date, which I now do.

3. Before turning to the detail of the Schemes, I wish to say a few introductory words about schemes of arrangement of this type and the procedure for dealing with them. I do so as a preface to my consideration of some of the jurisdictional issues that arose in this case and the procedure that was adopted, which, for the reasons that I will explain, I do not consider to have been entirely satisfactory.

Cross-border schemes of arrangement

4. In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England. In such cases, the English court has been satisfied that neither the EC Insolvency Regulation (EC 1346/2000) nor the EC Judgments Regulation (EC 44/2001) (now recast and replaced by Regulation EU 1215/2012 with effect from 10 January 2015) has prevented the court from having jurisdiction; and a sufficient connection with England to justify the exercise of the scheme jurisdiction of the English court has been found to exist as a result of the fact that the debt obligations which are to be restructured under the scheme are governed by English law. The legal issues arising in such cases were first considered in depth by Briggs J in Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus. L.R. 1245, [2012] BCC 459 ("Rodenstock") and were most recently tested before Hildyard J in Re Apcoa GmbH [2014] EWHC 3849 (Ch), [2015] Bus. L.R. 374, [2015] BCC 142 ("Apcoa") (a case in which permission to appeal to the Court of Appeal was granted, but the appeal was subsequently compromised).

5. The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups

of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.

6. In circumstances such as these, there is a considerable commercial imperative, and indeed pressure, upon the court to approve a scheme of arrangement. It should be emphasised, however, that even where the scheme in question has the support of an overwhelming majority of the creditors who are to be subject to it, the court does not act as a rubber stamp. Whether or not the scheme is opposed, the court requires those presenting the scheme to bring to its attention all matters relevant to jurisdiction and the exercise of its discretion. The court will then consider carefully the terms and effect of what is proposed, whether it has jurisdiction, and whether it is appropriate to exercise such jurisdiction. That is particularly the case when the court is considering a scheme for an overseas company which does not have its COMI or an establishment in England, where jurisdictional issues necessarily arise, and where recognition of the scheme in other countries will be important.

The Scheme Companies

7. There were six separate but inter-conditional Schemes in respect of the Scheme Companies. The first of these companies, Van Gansewinkel Groep B.V. ("VGG") is a management holding company. It is the contractual party to several key contracts and it performs the head office function for the Group, which carries on a waste management business across the Netherlands, Belgium and Luxembourg. The second Scheme Company, Van Gansewinkel Nederland B.V. ("VGN") is the principal operating subsidiary of VGG and has approximately 1,500 employees and numerous operating contracts. Robesta Vastgoed B.V. ("RV") operates as a real estate holding company. Riebeeck Olie Amsterdam 1 B.V. ("ROA"), Van Gansewinkel Belgie NV ("VGB") and Van Gansewinkel Industrie B.V. ("VGI") are all investment holding companies. As I have already stated, none of the Scheme Companies is an English company and none of them has its COMI, an establishment, or any substantial assets in England or Wales. I was told by Mr. Allison QC, who appeared for the Scheme Companies, that it is likely that the COMI of each of the Scheme Companies is located in their respective country of incorporation.

The financial obligations of the Scheme Companies

8. The Schemes concern the obligations of the Scheme Companies under an Existing Senior Facilities Agreement and part of VGG's liabilities under four Hedging Agreements entered into in order to hedge the floating interest rate liabilities under the Existing Senior Facilities Agreement.

9. Prior to the Schemes, the facilities under the Existing Senior Facilities Agreement included a number of fully drawn Term Facilities and a Revolving Facility amounting in total to just over €800 million as shown in the table below.

Facility	Borrower(s)	Total Commitments	Total Outstanding
2013 Tranche B1 Term Facility	VGG	€60,265,344.87	Fully drawn
	ROA	€4,990,816.62	Fully drawn
	VGI	€15,804,252.44	Fully drawn
	Total	€81,060,413.93	Fully drawn
2013 Tranche B2 Term Facility	VGG	€38,239,914.51	Fully drawn
2013 Tranche B3A Term Facility	VGG	€389,316,307.16	Fully drawn
2013 Tranche B3B Term Facility	RV	€10,571,566.54	Fully drawn
	VGN	€31,285,314.96	Fully drawn
	Total	€41,856,881.50	Fully drawn
2013 Tranche B3C1 Term Facility	VGG	€71,854,664.77	Fully drawn
2013 Tranche B3C2 Term Facility	VGG	€42,197,134.32	Fully drawn
2013 Tranche B3D Term Facility	VGB	€21,038,527.87	Fully drawn
2013 Tranche C Term Facility	VGG	€90,713,349.51	Fully drawn
2013 Revolving Facility	VGG	€69,976,185.64	€20,756,237

10. VGG was party to four Hedging Agreements with an aggregate notional amount of €600 million in order to hedge the floating interest rate liabilities under the Existing Senior Facilities Agreement. These Hedging Agreements were partially terminated (as to 50% of the notional amount hedged under each agreement) prior to the scheme meetings and the ascertained claims arising from the partial termination were voted at the scheme meetings.

11. The obligations of the Scheme Companies under the Existing Senior Facilities Agreement and the Hedging Agreements were guaranteed by each of the other Scheme Companies (and one additional Group company, Van Gansewinkel NV) and were secured by a comprehensive security package over the assets of the Group.

12. The Existing Intercreditor Deed provided that the liabilities owed by the Companies under the Existing Senior Facilities Agreement and the Hedging Agreements ranked *pari passu* in all circumstances. The Existing Senior Facilities

Agreement, the Hedging Agreements and the Existing Intercreditor Deed were each governed by English law.

The Scheme Creditors

13. The creditors to be affected by the Schemes ("the Scheme Creditors") were:

i) the creditors in respect of the term loans advanced under the Existing Senior Facilities Agreement ("the Term Scheme Creditors");

ii) the creditors in respect of the Revolving Facility under the Existing Senior Facilities Agreement ("the RCF Scheme Creditors"); and

iii) the creditors under the Hedging Agreements in respect of their ascertained claims arising from the partial termination of each of the Hedging Agreements ("the Hedging Scheme Creditors").

The debtor-creditor relationships under the parts of the Hedging Agreements which had not been terminated were not subject to the Schemes. Instead they will continue to hedge the floating interest rate liabilities under the debt reinstated under the Schemes by reference to the lower notional amount of €300 million.

The financial difficulties of the Group

14. The Group's revenue fell due to, amongst other things, a decline in waste volumes and severe price competition. The revenue for the Group declined from €1.034 billion in 2012 to €962 million in 2014. Moreover, the Group had negative net cash flow for 2014 of €38 million. In spite of cutting costs, the Group was unable to continue to meet its financial covenants and the Scheme Companies were unable to repay or refinance in full their obligations under the Existing Senior Facilities Agreement and the Hedging Agreements. The Group secured the forbearance of a significant majority of the Scheme Creditors pursuant to the terms of waiver requests so as to enable the formulation of the Schemes. The Scheme Creditors also agreed to waive certain breaches, including breaches of financial covenants, under the Existing Senior Facilities Agreement. In the absence of the relevant waivers and forbearance, Scheme Creditors would have been entitled to accelerate the sums owing under the Existing Senior Facilities Agreement and enforce the security granted by the Group.

The Schemes

15. The six Schemes were inter-conditional so that each of the Schemes had to be sanctioned in order for any of them to become effective. The terms of the restructuring and the Schemes and the anticipated benefits and inherent risks were fully explained in a detailed Explanatory Statement circulated to Scheme Creditors prior to the scheme meetings.

16. As is commonplace in schemes of this type, the operative provisions of the Schemes provided for the execution of a number of Restructuring Documents by an attorney appointed under the Schemes to act on behalf of the Scheme Creditors. The essential elements of the compromise and arrangement between the Scheme

Companies and their Scheme Creditors is to be found in those Restructuring Documents. The terms can be summarised as follows.

17. The claims of the Term Scheme Creditors and the Hedging Scheme Creditors (together "the Term & Hedging Scheme Creditors") are treated in materially the same way:

    i) €304 million of the Term & Hedging Scheme Claims will be amended and restated as an interest bearing debt owed by VGG in an amount of €320 million ("the Opco Debt"). The Term & Hedging Scheme Creditors will participate in the Opco Debt *pro rata* to their Term & Hedging Scheme Claims. The Opco Debt will have a term of five years from the date upon which the restructuring becomes effective. The Opco Debt will benefit from an enhanced guarantee and security package.

    ii) The remaining approximately €502,660,000 of Term & Hedging Scheme Claims (representing the debt owing by the Companies that the Scheme Companies' directors consider to be unsustainable) will be novated so that it is owed by an indirect holding company of the Parent ("Holdco"). The Term & Hedging Scheme Creditors will participate in this debt ("the Holdco Debt") *pro rata* to their Term & Hedging Scheme Claims. The Holdco Debt will be structurally subordinated to the Opco Debt. The Holdco Debt will have a term of six years from the date upon which the restructuring becomes effective. The Holdco Debt will not be guaranteed by other members of the Group and will not benefit from any security package from the Group.

    iii) The Term & Hedging Scheme Creditors will become the owners of the restructured Group. This will be achieved by the allocation of the shares in the ultimate parent company of the restructured Group ("Topco") to the Term & Hedging Scheme Creditors *pro rata* to their Term & Hedging Scheme Claims.

18. The Revolving Facility will be extended so that the maturity date falls five years after the date upon which the restructuring becomes effective and the RCF Scheme Creditors will benefit from an effective increase in the interest payable under the Revolving Facility.

19. Two simplified charts showing the Group structure and finance obligations before and after the restructuring are attached to this Judgment.

20. The Scheme Companies expressed the belief that the restructuring will leave the Group with a sustainable amount of debt on its balance sheet, placing it on a more stable footing with a view to maximising returns to its creditors in the years to come. The novation to Holdco of the debt which the Scheme Companies consider to be unsustainable will also allow the Term & Hedging Scheme Creditors to benefit from any future enhancement in the value of the Group. In addition, the Term & Hedging Scheme Creditors will, through their shareholdings in Topco, receive any value that might be created in the equity in the Group.

Possible alternatives to the Scheme

21. The submissions to me indicated that the Group had considered various alternatives to the Schemes but concluded that the Schemes represented the only realistic means by which to achieve the restructuring of the financial indebtedness of the Group so as to enable the Group to continue to trade. The expert evidence on Dutch law from Prof. Dr. Paul Michael Veder was to the effect that although a consultation is currently underway in the Netherlands in response to a recommendation of the European Commission that Member States of the EU should introduce a procedure similar to the scheme of arrangement into their national law, Dutch law does not yet provide a rescue procedure equivalent to a scheme of arrangement that could be used to bind a dissenting minority of creditors of a company outside a formal insolvency proceeding.

22. The evidence was that if the Schemes were not approved, then the Group would be likely to collapse into a series of formal insolvency proceedings in the Netherlands and Belgium. It was submitted that such a scenario would lead to a materially worse return to Scheme Creditors than the Schemes and would be likely to lead to the loss of the jobs of the Group's employees. There was, however, no detailed material provided either to the creditors or to me in support of these contentions as to the alternative to the Schemes. The only substantive information was that contained in the following paragraphs of the Explanatory Statement:

> "8.2 If the Schemes are not approved by the requisite majority of Scheme Creditors so as to become effective on the presently proposed timetable, the Restructuring is not likely to be consummated. The Boards believe that, in light of the considerable effort and time taken to agree the proposed Restructuring with key stakeholders, the prospects of agreeing an alternative transaction which would leave the Group with a viable capital structure before it would become necessary to place the Scheme Companies (and possibly other companies in the Group) into insolvency procedures are remote.
>
> 8.3 Accordingly, in the absence of the Restructuring completing as planned, the Boards (and the directors of other companies in the Group) would expect to determine shortly after it became apparent that the Restructuring was not capable of being implemented (for example, if the requisite majority of each class of creditors of each Scheme did not vote in favour of each Scheme or if the Court failed to sanction any of the Schemes) that they have no reasonable option other than to take steps to put the companies into an insolvent liquidation to protect those companies' assets for the benefit of their respective creditors.

> 8.4 In forming their opinion in relation to the recoveries that the Scheme Creditors may receive in the event of the insolvency of the Group, the directors of each Scheme Company have considered the relevant information available to them and have obtained advice from both financial and legal advisers, as well as assistance from KPMG Advisory N.V. in the form of an illustrative liquidation analysis of the possible outcomes for Scheme Creditors in the event that each Scheme Company and/or its Subsidiaries are placed into liquidation.
>
> 8.5 On the basis of considered and reasonable assumptions, the directors have concluded that the likely range of returns for Scheme Creditors in the event that each Scheme Company and/or its Subsidiaries are placed into liquidation would be between 38 per cent. (low case) and 46 per cent. (high case) in respect of their Scheme Claims.
>
> 8.6 In the absence of the Schemes being approved by the requisite majority of Scheme Creditors and becoming effective and the Restructuring being consummated, it is also acknowledged that a requisite majority of Scheme Creditors may then elect to take Enforcement Action in accordance with the terms of the Existing Senior Facilities Agreement."

23. On the basis of the Explanatory Statement, the accuracy of which was confirmed in the evidence in support of the application, I was prepared to accept that the Scheme Companies were indeed in urgent need of the restructuring proposed and that the alternative under formal insolvency proceedings was likely be far less advantageous for all concerned. I also accepted that the institutional Scheme Creditors in this case were likely to have been able to form their own view of the accuracy of the predictions in the Explanatory Statement.

24. I would, however, indicate for the future that companies that seek the consent of their creditors and the sanction of the court to a scheme of arrangement that is put forward as a more advantageous outcome for creditors than formal insolvency proceedings may be well advised to ensure that greater detail is provided, both in the Explanatory Statement and in the evidence before the court, as to the possible alternatives to the scheme and the basis for the predicted outcomes. The provision of such information is likely to be essential if there is a challenge to the scheme.

The Scheme Meetings

25. On 24 June 2015, the Scheme Companies applied to the court for an order convening meetings of the Scheme Creditors to consider the Schemes ("the Convening Hearing"). Mr Justice Henderson ordered that there be two separate meetings for VGG's Term & Hedging Scheme Creditors and its RCF Scheme Creditors, and for each of the remaining Scheme Companies he ordered that there

should be a single meeting of their Term Scheme Creditors ("the Scheme Meetings").

26. I was satisfied on the evidence of Ms. Priyanka Usmani of the Scheme Companies' solicitors, Freshfields Bruckhaus Deringer LLP, and the Report of Mr. Adam Gallagher, also of Freshfields, who acted as the Chairman, that Henderson J's order was complied with and the Scheme Meetings of Scheme Creditors were duly convened and held.

27. At those Scheme Meetings, there was a very high turnout of Scheme Creditors. The Scheme Creditors attending and voting in person or by proxy at the various meetings ranged between 88.3% to 96.7% by number of those entitled to attend and vote, and between 83.1% and 97.1% by value of those entitled to attend and vote. In each case, the requisite statutory majorities, both by number and by value, were obtained by a unanimous vote of those present. No-one voted against any of the Schemes at any of the Scheme Meetings.

Modifications

28. As is conventional, the Schemes included a provision under which minor modifications could, subject to certain conditions, be made to any of the Restructuring Documents. A small number of minor modifications were made to the Restructuring Documents between the Convening Hearing and the Scheme Meetings. These modifications were notified to Scheme Creditors in advance of the Scheme Meetings in accordance with the terms of Henderson J's Order. There were also a small number of modifications made after the Scheme Meetings to the draft Shareholders' Agreement and Articles of Association of Topco. These modifications were notified to the Scheme Creditors after the Scheme Meetings, but I was told that no creditors had expressed any dissent in respect of the changes and having had the changes outlined to me, I was satisfied that they were not sufficiently material to require further scheme meetings to be held.

Jurisdiction

29. It is, of course, of fundamental importance that the court should be satisfied that it has jurisdiction under the Companies Act 2006 to sanction a proposed scheme. There are generally two types of jurisdictional question. The first is whether the court is satisfied that the company proposing the scheme is a "company liable to be wound up under the Insolvency Act 1986" (see section 895(2)(b) Companies Act 2006). In a case such as the present, that raises international issues relating to the EC Insolvency Regulation and the recast EU Judgments Regulation, and as I shall explain, gave rise to a point of concern in this case. The second jurisdictional question is a purely domestic one – namely whether the classes of creditors were properly constituted for the purposes of the scheme. That did not give rise to any difficulty in this case.

30. At this stage I should say something about the procedure that was adopted in this case. At one time the practice was for the court to put the onus on the scheme company to propose its classes of creditors and take the risk of being shown to have got it wrong at the sanction hearing, with the consequence that the court would not have jurisdiction to sanction the scheme. That practice was heavily

criticised by Chadwick LJ in Re Hawk Insurance Co Limited [2001] 2 BCLC 480 at 512-514 (paras 18-22) and the practice was revised by a Practice Statement [2002] 1 WLR 1345. The main aim of the Practice Statement was to enable the scheme company to give notice to creditors, and to ask the court to determine the correct composition of the classes of creditors at the convening hearing rather than at the sanction hearing.

31. The Practice Statement does not deal with any other issues that might properly be considered at the convening hearing stage. However, a practice has developed under which other issues that go to jurisdiction can also be raised and considered at the convening hearing stage. The procedural aspects of raising such points was explained David Richards J in his judgment on the convening hearing in Re T&N Limited (No.3) [2007] 1 BCLC 563 at paragraphs 18-20. David Richards J made clear that just as the Practice Statement indicates that determination of a class issue at the convening stage cannot entirely preclude the issue being raised at the sanction hearing, so the same applies to other jurisdictional issues.

32. In this case, the Scheme Companies duly provided notice of the Convening Hearing to Scheme Creditors in accordance with the Practice Statement. That letter drew the attention of Scheme Creditors to the proposed classes of Scheme Creditors for the purposes of the Scheme Meetings and notified the Scheme Creditors of the date of the Convening Hearing. However, the Practice Statement letter gave no indication that any other jurisdictional issues were intended to be addressed at the Convening Hearing. The order made by Henderson J at the Convening Hearing also did not contain any indication that he had been invited to consider or determine any other jurisdictional issues.

33. Notwithstanding that, Mr. Allison's skeleton argument before me stated that in addition to considering the correct composition of the classes as envisaged by the Practice Statement letter, Henderson J had in fact also considered the question of whether the court had jurisdiction in the international sense in respect of the Schemes. In support of that, I was shown an extract from the skeleton argument for the Convening Hearing that had addressed some of the international jurisdictional issues. Mr. Allison then submitted that as there had been no suggestion by any Scheme Creditor that there was any issue in respect of jurisdiction, I could accordingly be satisfied that the court had jurisdiction to sanction the Schemes.

34. However, when I asked whether there was any transcript of Henderson J's judgment or ruling, I was told that he had not been invited to give a formal judgment and had not done so. I therefore took the view that I was obliged to look at the jurisdictional issues for myself.

35. As indicated above, the court only has jurisdiction to sanction a scheme in respect of "a company liable to be wound up under the Insolvency Act 1986" (see section 895(2)(b) Companies Act 2006). A series of cases has now considered the meaning of that expression: see e.g. Re Drax Holdings Ltd [2003] EWHC 2743 (Ch), [2004] 1 W.L.R. 1049 ("Drax"); Re DAP Holding NV [2005] EWHC 2092 (Ch), [2006] BCC 48 ("DAP"); Sovereign Marine & General Insurance Co Limited [2006] EWHC 1335 (Ch), [2006] BCC 774; and Rodenstock.

36. In Rodenstock at paragraph 56, Briggs J accepted that the phrase "liable to be wound up" was a convenient phrase designed simply to identify the types of company and associations to which the scheme jurisdiction applies. The power to wind up a company extends to a foreign company: see sections 220 and 221(1) of the Insolvency Act 1986. It has also been held that the scheme jurisdiction does not depend upon transient considerations that might change from time to time so that a company is "liable to be wound up" for the purposes of the scheme jurisdiction even if its circumstances are such that the court would not, at the time, in fact exercise its jurisdiction to wind-up the company: see e.g. DAP at paragraph 11. Accordingly, all of the Scheme Companies appear to satisfy this requirement.

37. The question arises, however, whether either of the Insolvency Regulation or the recast Judgments Regulation has the effect of limiting or restricting the scheme jurisdiction of the court in respect of a company with its COMI in another EU member state and no establishment here. That issue was considered in DAP and Rodenstock and has been further addressed in a series of other cases since: see e.g. Re Primacom Holding GmbH [2011] EWHC 3746 (Ch) and [2012] EWHC 164 (Ch); [2013] BCC 201 ("Primacom"); Re Nef Telecom BV [2012] EWHC 2944 (Ch), [2014] BCC 417; and Re Vietnam Shipbuilding Industry Group [2013] EWHC 2476 (Ch); [2014] BCC 433 ("Vietnam Shipbuilding").

38. There is general agreement in those authorities that although the Insolvency Regulation prevents a winding up order from being made by the court unless the company in question has its COMI or an establishment in England, that does not have the effect of limiting the English court's scheme jurisdiction. Two reasons have been suggested for this conclusion. The first is the point made in DAP that the scheme jurisdiction is not intended to depend upon transient considerations, and that the COMI of a company - which is capable of changing - is one such consideration.

39. The alternative explanation accepted in Rodenstock is that the Insolvency Regulation was simply never intended to limit the scheme jurisdiction of the English court at all. Schemes of arrangement are not collective insolvency proceedings of the type dealt with by the Insolvency Regulation and are not listed in Annex A to the Regulation. It would therefore be very surprising to conclude that the framers of the Insolvency Regulation ever intended that it should have some direct or indirect effect upon the English scheme jurisdiction. Further, the scheme provisions of the Companies Act 1985 were not amended when the Insolvency Regulation came into force, and the redrafted scheme provisions in the Companies Act 2006 did not make any reference to the Insolvency Regulation, as might have been expected if a limitation to the scheme jurisdiction had been intended.

40. I find these arguments persuasive, and I am not at all attracted by the alternative argument that a limitation on the scheme jurisdiction of the English court was introduced indirectly, and *sub silentio* when the Insolvency Regulation came into force. I am therefore content to follow the prevailing view that the Insolvency Regulation imposes no limitation on the scheme jurisdiction of the court.

41. The issue of the potential application of the recast Judgments Regulation is more difficult. There are two possibilities: either the jurisdictional requirements in

Chapter II of the Judgments Regulation are wholly inapplicable to schemes of arrangement, or schemes of arrangement do fall within Chapter II of the Judgments Regulation, and the English court therefore has to be satisfied that it can assume jurisdiction under one of the Articles in that Chapter.

42. The first possibility – namely that schemes of arrangement between a company and its creditors are a type of proceeding that fall outside Chapter II of the Judgments Regulation was the view taken by Lewison J in DAP on the basis that they fell within the exclusion in Article 1(2)(b) for "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". In Primacom, Hildyard J also took the view that the main jurisdictional provision in Chapter II – what is now Article 4 of the recast Judgments Regulation - could not apply to creditors' schemes, because it referred to a person being "sued" in the member state in which he was domiciled, and that no-one is sued in a conventional sense in scheme proceedings. There is force in these views – not least because it must be highly doubtful that the framers of Part II of the Judgments Regulation had schemes of arrangement in mind at all. If correct, the consequence of this approach would be that I had jurisdiction to sanction the Schemes in this case.

43. The alternative argument commences with the observation that Article 1(1) of the recast Judgments Regulation provides that the Regulation applies to "civil and commercial matters, whatever the nature of the court or tribunal", which is entirely appropriate to include a scheme of arrangement. The argument then maintains that the exclusion in Article 1(2)(b) of the Judgments Regulation is designed simply to exclude proceedings or compromises within proceedings falling within the Insolvency Regulation, because the Judgments Regulation and the Insolvency Regulation must be interpreted so as to dovetail into one another, with no overlap and no gap (or "legal vacuum") between them. Hence, it is said, since a scheme of arrangement is not within the Insolvency Regulation, it must fall within the Judgments Regulation.

44. This argument was accepted in relation to schemes involving solvent companies by Briggs J in Rodenstock at paragraph 47-51 but he left open the question in relation to schemes involving insolvent companies. In Re Magyar Telecom BV [2013] EWHC 3800 (Ch) ("Magyar") at paragraphs 28-29, David Richards J referred to Rodenstock and suggested that a scheme between an insolvent company and its creditors would fall within the Judgments Regulation, at least unless the company was subject to an insolvency proceeding falling within the Insolvency Regulation. Since those decisions, the view that there can be no gap between the Judgments Regulation and the Insolvency Regulation has also been endorsed (albeit not in the context of a scheme case) by the ECJ in Nickel & Goeldner Spedition [2015] QB 96 at paragraph 21 and in Comité d'entreprise de Nortel Networks SA v. Rogeau and others (Case C-649/13, Judgment given on 11 June 2015) at paragraph 26.

45. This point is of some difficulty and, in order to avoid having to decide it, in a number of scheme cases the court has simply gone on to look at the question of whether, on the assumption that the Judgments Regulation does apply, jurisdiction to entertain the scheme could in fact be found within its provisions.

46. In that respect, three alternatives have usually been offered. The first is based on the argument that scheme creditors cannot insist on being sued in their member state of domicile under Article 4(1) of the recast Judgments Regulation because they have contractually submitted to the jurisdiction of the English court for the determination of disputes concerning their relationship with the company, and that this extends to a scheme of arrangement to compromise such rights. That argument relies upon Article 25(1) of the recast Judgments Regulation that operates as an exception to the jurisdictional rule in Article 4. Article 25(1) provides,

> "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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise...."

47. This was the basis upon which Mr. Allison's skeleton argument for the Convening Hearing before Henderson J had indicated that, if the recast Judgments Regulation applied, jurisdiction could be found in the instant case. It had been submitted that the court had jurisdiction over the Scheme Creditors because of what were described as "the exclusive jurisdiction clauses in favour of England and Wales found in the Existing Senior Facilities Agreement, the Hedging Agreements and the Existing Intercreditor Deed".

48. I do not accept that argument. The first and most significant of the jurisdiction clauses in the Existing Senior Facilities Agreement provided as follows (the reference to the "Finance Parties" being to the Scheme Creditors, and the reference to an "Obligor" being to the relevant Scheme Company):

> "33.2 For the benefit of each of the Finance Parties, each Obligor irrevocably submits to the exclusive jurisdiction of the courts of England for the purpose of hearing and determining any dispute arising out of this Agreement and for the purpose of any enforcement of any judgment against its assets.
>
> 33.3 The submission to the jurisdiction of the courts referred to in clause 33.2 shall not (and shall not be construed so as to) limit the right of any Finance Party to take proceedings against any Obligor in the courts of any country in which any Obligor has assets or in any other court of competent jurisdiction nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction (whether

concurrently or not) if and to the extent permitted by applicable law."

49. As I pointed out, and Mr. Allison readily accepted at the hearing, this was not a clause by which any of the Scheme Creditors submitted to the jurisdiction of the English court at all. It was a submission to the jurisdiction only by the Scheme Companies. But the Scheme Companies were voluntarily invoking the scheme jurisdiction of the English court in any event. In my view, the issue under Article 25(1) was whether the English court had jurisdiction over the Scheme Creditors. In that respect, the fact that the jurisdiction clause was for the benefit of the Scheme Creditors did not assist, and whatever view may have been taken of the jurisdiction clauses in other cases, I did not think that the terms of clause 33.2 and 33.3 of the Existing Senior Facilities Agreement supported Mr. Allison's argument in this case.

50. Attention therefore focussed upon the second provision most often relied upon in cases of this type, namely the provisions in Article 8(1) of the recast Judgments Regulation. That provides that,

> "A person domiciled in a Member State may also be sued:
>
> (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

51. In Rodenstock at paragraphs 61-62, Briggs J suggested that on the assumption that the Judgments Regulation applied to schemes of arrangement, they might be capable of being "shoehorned" into this provision on the basis that the scheme creditors who are entitled to appear and oppose the relief sought, and who will be bound by the result, could be regarded as defendants for this purpose. In Rodenstock, more than 50% of the scheme creditors were domiciled in England and this provided some reassurance for Briggs J. That was not the situation of the Scheme Creditors in the instant case. The evidence contained no information as to the domicile of any of the Scheme Creditors, but after a short adjournment whilst inquiries were made, I was told by Mr. Allison (on instructions) that out of a total of 106 Scheme Creditors, 15 creditors with claims totalling about €135 million were domiciled in England, and that these creditors were spread across the various creditor classes. Although this number did not meet the 50% mentioned in Rodenstock, I cannot see that this makes any difference. On the assumption that the recast Judgments Regulation applies, Article 8(1) would be potentially engaged provided that at least one creditor is domiciled in England and it is expedient to hear the "claims" against all other scheme creditors together with the "claim" against him. In the instant case, the numbers and size of the Scheme Creditors domiciled in England were far from immaterial, and in my judgment

they were sufficiently large that the test of expediency was satisfied. I therefore considered that I was entitled to regard all Scheme Creditors as coming within the jurisdiction of the English court under Article 8(1) for the purposes of the exercise of the scheme jurisdiction in relation to them.

52. That conclusion made it unnecessary for me to consider the third alternative basis for jurisdiction suggested in Rodenstock at paragraph 61, namely the possibility that the English court could simply apply its scheme jurisdiction rules by analogy with the provisions of Article 6 of the recast Judgments Regulation. That argument has not been much developed in subsequent cases, and I would prefer to express no view upon it.

53. Since the intention to ask Henderson J to determine the composition of the classes of Scheme Creditors had been fully disclosed in the Practice Statement letter, and there was no challenge to the class composition at the sanction hearing I was entitled to take the view that the jurisdictional requirements in that regard were satisfied, and in any event it seemed to me that Henderson J's order was plainly correct.

54. Accordingly, I concluded that I had jurisdiction to sanction the Schemes in the instant case.

55. Before leaving the question of jurisdiction, I think that I should indicate that I do not regard the procedure adopted in this case as having been entirely satisfactory. If the proponents of a scheme intend, in addition to class issues, to raise a jurisdictional issue for determination at the convening stage, they should indicate that and give proper details of the argument in the Practice Statement letter notifying creditors of the convening hearing. It is only in that way that creditors will have fair warning of what is on the agenda and will be able to make an informed decision as to whether to attend the convening hearing.

56. Moreover, if the proponents of the scheme wish the judge at the convening hearing to consider and determine a jurisdictional issue in a way that can be relied upon as a basis for persuading the judge at the sanction hearing not to revisit the question, then it is incumbent upon the proponents of the scheme to ensure that this is very clearly brought to the attention of the judge at the convening hearing. The judge at the convening hearing can then give a reasoned judgment on the point or at very least ensure that his essential reasoning is captured and recorded in the order that he makes. If this does not occur, there is a very real risk of misunderstanding and a possibility that the jurisdictional issue will not receive the close attention that it deserves at either stage.

The general test for the exercise of discretion

57. The general principles to be considered by the court when deciding whether to sanction a scheme of arrangement were summarised by David Richards J, (referring to the earlier provisions of section 425 of the Companies Act 1985) in Re Telewest Communications (No. 2) Ltd [2005] 1 BCLC 772 ("Telewest (No.2)") at [20]-[22]:

"20. The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Ltd [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:

> 'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
>
> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.'

21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under section 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.

22. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'."

58. I can deal with these issues briefly. I have already indicated above that the class question was determined by Henderson J, and that I was satisfied on the evidence that the Scheme Meetings had been properly convened and held and that the necessary statutory majorities had been obtained by a large margin.

59. As I have also indicated, there was a very high turnout of Scheme Creditors at the Scheme Meetings, and there was nothing to suggest that the relevant classes of Scheme Creditors were not fairly represented by those voting at the Scheme Meetings. In particular, although a very high proportion of those voting at the Scheme Meetings had entered into what is known as a "lock-up" agreement with the Scheme Companies under which they agreed in advance to vote in favour of the Schemes, the opportunity to enter into such an agreement was available to all Scheme Creditors, no "consent fee" was payable to those creditors who decided to enter into a lock-up agreement, and I was told that there had been no material adverse change in the circumstances of the Scheme Companies since the lock-up agreements were entered into. The type of issues that arose for consideration in Re Telewest Communications plc (No.1) [2005] 1 BCLC 752 at paragraphs 52–55, Primacom at paragraphs 55–57, and Apcoa at paragraphs 84–106 did not, therefore, arise.

60. I was also satisfied that each of the Schemes was one that an intelligent and honest man, a member of the class and acting in respect of his interest, might reasonably have approved. As I have indicated, the directors of the Scheme Companies considered that the Schemes would be likely to lead to a better return to the Scheme Creditors than would be the case if the Schemes were not implemented, and the overwhelming majority of the Scheme Creditors, both by number and amount, gave their approval to the Schemes. As David Richards J indicated in the passage from Telewest (No.2) to which I have referred above, the Court will generally recognise that scheme creditors are the best judges of their own commercial interest, and there was nothing to cause me to depart from that view in this case.

Release of the non-Scheme Company guarantor

61. The extract from David Richards J's judgment in Telewest (No. 2) also indicates that the court will not generally sanction a scheme if it finds a "blot" (such as an illegality or material mistake) in the scheme. Put another way, the court is unlikely to approve a scheme that does not have the effect that the company and creditors intend. In that respect, there was one issue that arose on the terms of the Schemes that required attention at the hearing.

62. Under the restructuring, the new Holdco Debt will not be guaranteed by any of the existing guarantors of the Existing Senior Facilities Agreement. This will require that each of the existing guarantor companies should be released by the Scheme Creditors from their obligations in respect of that part of the existing debt that is to be novated to form the Holdco Debt. There was no jurisdictional or technical difficulty in achieving the necessary release in respect of the Scheme Companies themselves: that is plainly a part of a compromise or arrangement between the company and its creditors which falls within section 895 of the Companies Act

2006. But the same is not true of the release by Scheme Creditors of their rights against Van Gansewinkel NV which, as I have indicated above, is not a Scheme Company.

63. It is well-settled that it is possible, as part of a scheme, to require scheme creditors to give up rights against third parties (such as guarantors) where such a release is necessary to give legal or commercial effect to the compromise or arrangement between the scheme company and its creditors: see e.g. Re Lehman Brothers (Europe) International [2010] 1 BCLC 496 at paragraph 65. That test plainly would apply in the instant case: the release of Van Gansewinkel NV is part and parcel of the compromise between Scheme Creditors and the Scheme Companies and the intention is that the Holdco Debt should be insulated and not be secured or guaranteed by other Group companies.

64. As a practical matter, one way in which the release of a third party can be achieved is for a scheme to authorise an attorney to execute a deed of release on behalf of all scheme creditors in favour of the guarantor company. In this case, the restructuring documentation provided for in the Schemes did not expressly include such a deed of release, and there was no other provision of the Schemes that (at least to my mind) clearly provided a mechanism under which such a release could be granted in favour of a company that was not a party to the Schemes. The Scheme Companies (and the co-ordinating committee of lenders) maintained that the release provisions in the Schemes would be effective to release the non-Scheme Company, but as a matter of caution a solution was found in the definition of "Restructuring Documents" which the terms of the Schemes authorised to be entered into on behalf of the Scheme Creditors. That definition included, in addition to a large number of specified documents, "any other documents that the Scheme Companies consider necessary or desirable to give effect to the Restructuring". I indicated that this could include a suitable deed of release in standard form, and the Scheme Companies willingly indicated that they would procure that such a document was executed.

65. Of itself, that would not have been sufficient, because the court will not ordinarily sanction a scheme which contains or provides for significant new or different terms that have not been drawn to the attention of creditors prior to their voting upon the scheme. But in this case the intention that the Scheme Companies and Van Gansewinkel NV should not be guarantors of the Holdco Debt had been made clear in the following paragraphs of the Explanatory Statement (which defined Guarantors to include all existing guarantors of the Existing Senior Facilities Agreement):

> "6.2 The obligations of the Guarantors shall be amended and varied such that after the Restructuring becomes effective the Guarantors (including the Scheme Companies) shall only guarantee the liabilities of the Scheme Companies under the terms of the Opco Facilities Agreement.
>
> 6.3 The Guarantors (including the Scheme Companies) will not guarantee the obligations of Holdco pursuant to the Holdco Facility Agreement and so there will be a reduction

in the liabilities guaranteed by the Guarantors as against the existing position under the Existing Senior Facilities Agreement."

66. I was therefore satisfied that the intention that Scheme Creditors should release Van Gansewinkel NV from some of its obligations as a guarantor was sufficiently brought to the attention of Scheme Creditors so as not to require further Scheme Meetings to be held.

A "sufficient connection" with England

67. The mere fact that the English court has jurisdiction to approve a scheme in respect of an overseas company does not, of course, mean that the jurisdiction will necessarily be exercised. In Drax at paragraph 29, Lawrence Collins J indicated that the court should not exercise its discretion unless a "sufficient connection" with England is shown.

68. In a number of recent cases, a sufficient connection has been found to exist solely or principally by reason of the fact that the relevant rights of the scheme creditors were governed by English law and that there was an exclusive or non-exclusive jurisdiction clause in favour of the English court: see e.g. Rodenstock, Primacom and Vietnam Shipbuilding. In this case, the governing law of all of the relevant financing documents has been English law from the start, and so in that respect, the case is on all fours with Rodenstock and the cases that have followed it. Specifically, this case does not raise any of the more controversial issues which arose in Apcoa as a result of a change in the governing law to English law for no reason other than to persuade the English court to exercise its scheme jurisdiction.

69. Further, although I have made the point that the jurisdiction clause in the Existing Senior Facilities Agreement would not suffice for the purposes of establishing jurisdiction under Article 25(1) of the recast Judgments Regulation, there is no doubt that it does indicate a further connection with England.

70. On that basis, therefore, I concluded that a sufficient connection with England had been shown to warrant the exercise of the scheme jurisdiction in respect of the Schemes.

Recognition of the Schemes in the Netherlands and Belgium

71. The question of whether a scheme in respect of an overseas company without its COMI or an establishment here will be recognised abroad arises either as part of the question of whether there is a sufficient connection with England (see Magyar at paragraph 21), or as a free-standing factor in the exercise of discretion because the English court will not generally make any order which has no substantial effect or will not achieve its purpose: see Sompo Japan Insurance Inc v. Transfercom Limited [2007] EWHC 146 (Ch) at paragraphs 18-20, and Rodenstock at paragraphs 73-77. In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the

scheme companies in other countries on the basis of an assertion of their old rights. The English court does not need certainty as to the position under foreign law – but it ought to have some credible evidence to the effect that it will not be acting in vain.

72. In the instant case the relevant foreign jurisdictions in which the Scheme Companies have substantial assets and operations are the Netherlands and Belgium, and I had the benefit of expert evidence in respect of both those countries from Prof Dr. P.M. Veder on Dutch law and Prof. Dr. Geert van Calster on Belgian law. There were a number of alternative scenarios that were explored in the evidence and in the submissions before me.

73. The first scenario was that if this court's jurisdiction for the Schemes was established under Chapter II of the recast Judgments Regulation, then the experts were agreed that the Schemes would automatically be recognised under Chapter III (Articles 36 et seq.) of the same Regulation by virtue of this court's judgment. In opining that the Dutch and Belgian courts would regard the court order sanctioning the Schemes as a judgment within the meaning of Article 2 of the recast Judgments Regulation, the experts placed weight upon the functions of this court in determining whether to sanction a scheme, even in the absence of active opposition, to which I have referred above. That simply re-emphasises the importance of the parties and the court ensuring that the established procedures are properly followed, and the reasons for the court's decision are recorded. The experts also agreed that none of the grounds upon which recognition of a judgment can be refused under the recast Judgments Regulation (e.g. domestic public policy) would be applicable.

74. The second possibility is that even if this court's jurisdiction was not founded upon Chapter II of the recast Judgments Regulation because schemes of arrangement fall outside that Regulation, the Schemes would nevertheless still be recognised automatically under Chapter III by virtue of this court's judgment, because a court in the Netherlands or Belgium would not review the assumption of jurisdiction by the English court: see Articles 45(3) and 45(2)(e) of the recast Judgments Regulation. I note, however, that an argument to this effect does not appear to have impressed Briggs J in Rodenstock at paragraph 49, and the basis for such a conclusion was not explicitly discussed in either expert report before me.

75. Accordingly, greater weight was attached by Mr. Allison to the final possibility canvassed in the expert evidence, namely that even if this court's jurisdiction was not founded upon Chapter II of the recast Judgments Regulation and as a result could not be recognised under Chapter III, the Schemes would nonetheless still be recognised under the domestic Dutch and Belgian rules of private international law. In that regard, both experts were clearly of the view that their domestic conflicts of law rules would enable the courts in the Netherlands and Belgium to grant recognition to the Schemes and that they would be unlikely to refuse to give effect to them. Although I would voice the reservation that Prof. Dr. Veder seems to have relied in part upon a wide reading of the jurisdiction clauses in the Existing Senior Facilities Agreement to which I have referred above, I was satisfied that his evidence still indicated that there was a realistic prospect that the

Schemes would be recognised under the domestic law of the Netherlands even if the recast Judgments Regulation was not applicable.

76. In my judgment, taken as a whole, the expert evidence therefore provided a sufficient basis for me to conclude that there was a good prospect that I would not be sanctioning the Schemes in vain. In that regard I was further supported by the fact that the Schemes had received such a high level of support from the overwhelming majority of Scheme Creditors, and no opposition had been indicated from any of the non-consenting creditors. Being pragmatic, this meant that the chances of action by a dissentient creditor, or the practical consequences thereof, are unlikely to be sufficient to negate the effect of the Schemes for the Scheme Companies and the overwhelming majority of Scheme Creditors.

The US Securities Act 1933

77. As a final point, I should add that my attention was drawn to the fact that the offer and transfer of Topco shares to Scheme Creditors in the United States would be prohibited unless such an offer complies with the registration requirements of the Securities Act of 1933 and the rules and regulations thereunder, or was exempt from, or not subject to, such requirements. The Scheme Companies did not seek any order in this regard, but told me that they were required, pursuant to guidance published by the Securities and Exchange Commission, to notify me that they intended:

i) to rely on the exemption in section 3(a)(10) of the 1933 Act; and

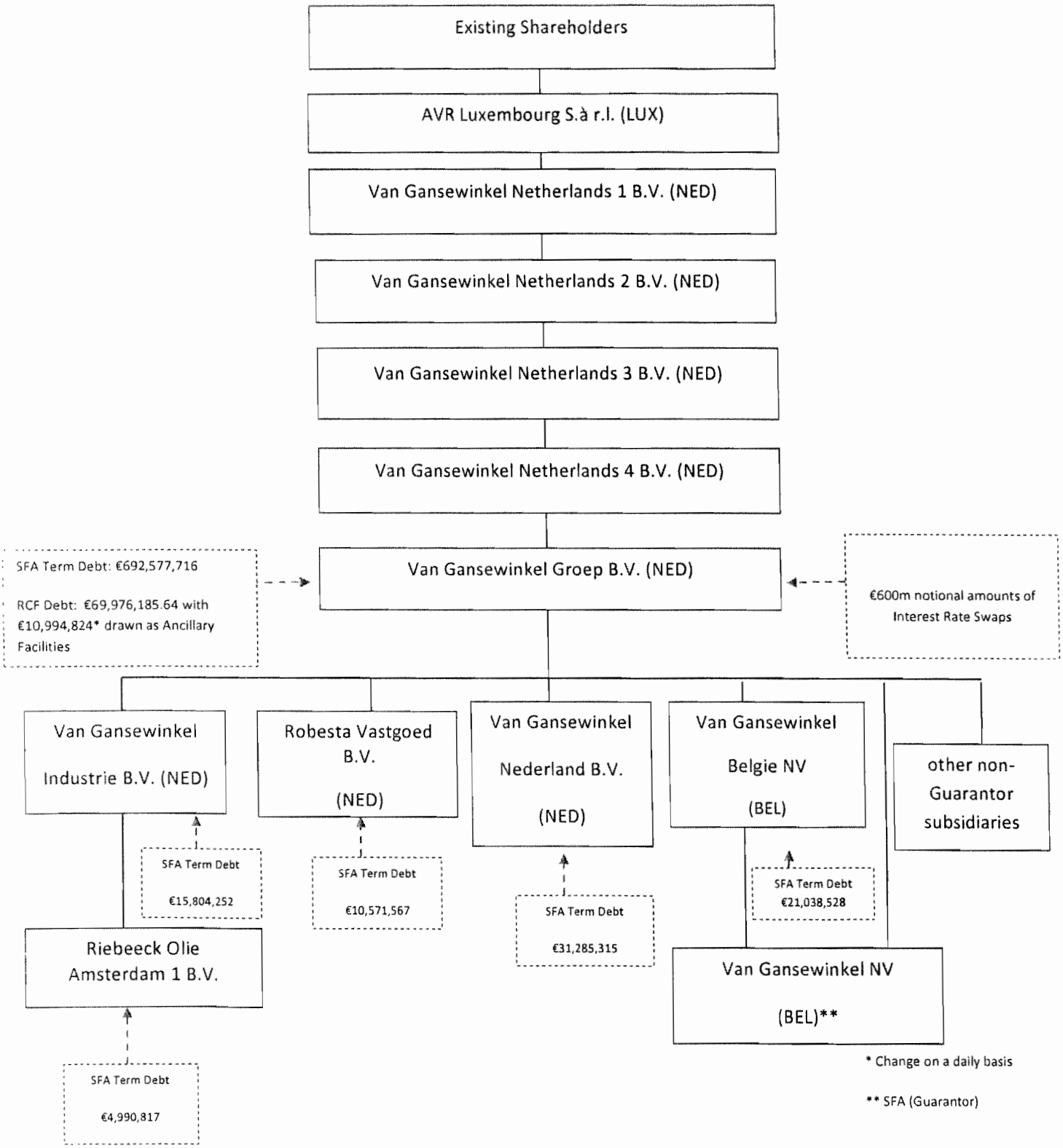
ii) to rely on my sanction of the Schemes as an approval of the Schemes and the transactions contemplated by them, including the transfer of Topco shares, following a hearing on the fairness of the terms of the Schemes at which hearing all Scheme Creditors are entitled to attend in person or through counsel to support or oppose the sanctioning of the Schemes.

I confirm that I was so notified.

Conclusion

78. For the reasons given above, I was satisfied in all the circumstances that I had jurisdiction, and that it was appropriate to exercise my discretion, to sanction the Schemes.

STRUCTURE CHART PRE-RESTRUCTURING (DEBT STRUCTURE)



STRUCTURE CHART POST-RESTRUCTURING (DEBT STRUCTURE)