Neutral Citation Number: **[2020] EWHC 2683 (Ch)**

Case No: CR-2020-003544

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: **6 October 2020**

Before :

Mrs Justice Falk

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Re:

IN THE MATTER OF CODERE FINANCE 2 (UK) LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

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David Allison QC and Ryan Perkins (instructed by **Clifford Chance LLP**) for the **Company**

Hearing date: **6th October 2020**

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JUDGMENT

Mrs Justice Falk

1. This is my decision on the application of Codere Finance 2 (UK) Limited (the "Company") for an order sanctioning a scheme of arrangement between the Company and certain of its creditors (the "Scheme creditors") under Part 26 of the Companies Act 2006.
2. I heard the Company's application for an order convening a single meeting of Scheme creditors. That application was strongly opposed by Kyma Capital Limited ("Kyma") on behalf of a fund managed by it, on the basis that members of ad hoc committee of Scheme creditors (the "AHC"), who hold around 55% by value of the Existing Notes (see below) and who had negotiated the proposed restructuring with the Group, should be treated as a separate class.
3. I decided that it was appropriate to convene a single meeting of Scheme creditors. I handed down a judgment in respect of that decision on 13 September 2020 ([2020] EWHC 2441 (Ch)) (the "convening judgment").
4. The background to the proposed Scheme is set out in greater detail in the convening judgment. In summary, the Company is part of the Codere group of companies (the "Group"), an international gaming operator. Its financial position has worsened significantly during the COVID-19 pandemic, resulting in a liquidity crisis.
5. The Group's financing arrangements include two series of notes with face values of €500 million and US$300 million respectively (together, the "Existing Notes"). The Company is a co-issuer of the Existing Notes alongside Codere Finance 2 Luxembourg SA ("Codere Finance"). It is the ultimate beneficial owners of the Existing Notes who are the proposed Scheme creditors.
6. If the Scheme is implemented, the maturity of the Existing Notes will be extended from 1 November 2021 to 1 November 2023. The interest rate on them will be increased and certain changes will be made to covenants. In addition, Codere Finance will raise €165 million of new money (the "New Notes"), which will be offered pro rata to holders of Existing Notes and, to the extent not taken up

by them, will be subscribed by four out of five members of the AHC under the backstop arrangement described in my earlier judgment. The Group's expectation is that it will then be able to continue trading and repay the Existing Notes in full at the revised maturity date. In contrast, if the Scheme is not implemented, the most likely alternative would be a liquidation resulting in far lower returns for Scheme creditors (see paragraphs 19 to 22 of the convening judgment).

7. The terms of the Scheme authorise the Company to enter into restructuring documents on behalf of the Scheme creditors and also set out the mechanism under which the New Notes will be acquired. As explained in the convening judgment at paragraph 138, the object of the Scheme is to compromise the claims of Scheme creditors against all obligors in respect of the Existing Notes, including the co-issuer (Codere Finance) and Group guarantors. It is well established that this is possible as a matter of jurisdiction, to ensure that effect can be given to the arrangement by preventing so-called "ricochet claims" which would defeat the purpose of the Scheme, including in this case the claim for a contribution that the co-issuer could bring if a claim was made against it that was not compromised by the Scheme: see, for example, *Re Lecta Paper UK Limited* [2020] EWHC 382 (Ch) at [21].

8. The Scheme meeting was held remotely on 29 September 2020. I have read the chairman's report and related witness evidence, which indicate that there were no technical difficulties for Scheme creditors wishing to attend or participate in the meeting. At the meeting the Scheme was approved by 249 out of the 250 Scheme creditors present in person or by proxy, representing 99.99% by value of those creditors. In terms of turnout, Scheme creditors voting at the meeting in person or by proxy represented 94.76% by value of the amounts outstanding to all Scheme creditors. For these purposes, Scheme creditors' holdings of Existing Notes that are denominated in US dollars were notionally converted into euros at a spot rate of exchange on the business day immediately preceding the record time.

9. Therefore, only one Scheme creditor, holding 0.01% by value, voted against the Scheme. That creditor has not appeared before me to object to the Scheme being sanctioned, and neither has any other person.

10. The creditors voting in favour included Kyma, who had dropped its opposition to the Scheme. Mr Allison, for the Company, confirmed to me that Kyma received no additional payment or disguised consideration in respect of its support for the Scheme. The Group has agreed to pay a proportion of Kyma's costs of the convening hearing, which was a matter left outstanding following the last hearing, but nothing more. Mr Allison also confirmed on instruction that around €108 million of the New Notes have been taken up by holders of Existing Notes, leaving around €57 million to be taken up under the backstop arrangement.

Scheme sanction: the principles

11. The principles to be applied in determining whether to sanction the Scheme are well known. They were considered by David Richards J in *Re Telewest Communications (No 2)* [2005] BCC 36 at [20] to [22], where he cited a passage from Plowman J's judgment in *Re National Bank Limited* [1966] 1 WLR 819, which in turn set out the test by reference to a passage in Buckley on the Companies Acts.

12. In summary, the first step is to consider whether the provisions of the statute have been complied with. The second is to determine whether the class was fairly represented by those who attended the meeting, and that the statutory majority were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent. The third is to determine whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The question is whether in that sense the Scheme is a fair one.

13. As David Richards J explained, the Scheme need not be the only fair Scheme or even the best Scheme. Furthermore, whilst the court's function is not simply to register the decision of the

meeting, it will, at the same time, be slow to differ from it, unless the class has not been properly consulted, the meeting has not considered the matter with a view to the interests of the class, or there is some other blot (a defect) in the Scheme. This is because the courts recognise that in commercial matters the creditors or members voting are much better judges of their own interests than the court.

Statutory requirements

14. I am satisfied that the statutory requirements have been met. The Scheme meeting was convened in the manner that I directed, and at the meeting the necessary majorities, being a majority in number and 75% in value of members of the class present and voting in person or by proxy, were comfortably achieved.

15. Class issues were considered by me in depth in the convening judgment, following detailed written and oral submissions from leading counsel for the Company, the AHC and the opposing creditor. Following that decision, no other creditor has appeared to contend that the class composition was incorrect, and Kyma has withdrawn its own opposition. In the circumstances, there is no reason not to follow my earlier decision on the question of class composition.

16. The order made following the convening hearing contemplated that the Scheme document would be amended to reflect my judgment. I have been shown the changes that were made to the explanatory statement which was circulated pursuant to section 897 of the Companies Act 2006, in particular to ensure that the Interim Notes referred to in the convening judgment were not described as independent of the Scheme, and to include evidence relating to the aggregate level of recovery projected to be available to AHC members as compared to a hypothetical Scheme creditor holding €10 million of Existing Notes.

17. I note that the calculations of cumulative benefit included in the explanatory statement broadly correspond to those considered by me at paragraphs 114 to 117 of the convening judgment. I also note that, excluding advisers' fees and any mark-to-market gain on the Interim Notes, but including the full amount of interest on them to maturity, the enhancement for AHC members participating in

the Interim Notes and backstop, as compared to a non-AHC member who takes up New Notes, is around 4.2%, or 3.4% excluding advisers' fees and consent fees. These are the same percentages as referred to in the convening judgment at paragraph 117. If advisers' fees and consent fees are not excluded, the enhancement is 5.1%, as stated at paragraph 116.

Was the class was fairly represented?

18. I am also satisfied that the class was fairly represented by the meeting, and that the majority acted bona fide.

19. Importantly, I note that the outcome of the meeting was such that, even if members of the AHC or those participating in the backstop had voted as a separate class, the Scheme would still have been overwhelmingly approved by the other creditors, in fact by over 99% in number and by value of those voting. The overall turnout was also very high, at 94.76% by value. There has clearly been no coercion of a minority in order to promote interests adverse to those of the class, and no one has appeared at this hearing to raise any objection.

Could a Scheme creditor reasonably approve the Scheme?

20. As already mentioned, the court will generally be slow to differ from the result of the meeting. I am satisfied, taking account of the detailed information provided to creditors at various stages, including via the Practice Statement letter and the Scheme document, that the class has properly been consulted. There is nothing to indicate that the meeting did not properly consider the matter with a view to the interests of the class, or that there was any other defect in the Scheme. It is again relevant that the overwhelming majority of Scheme creditors have approved the Scheme, and that this would have been the case even if AHC members or those participating in the backstop had been excluded. Given the most likely alternative of a liquidation, which would be expected to achieve returns of between 0 and 4.1% as compared to the likelihood of full recovery in the event the Scheme is implemented (see the convening judgment at paragraph 18), this level of support is not surprising.

21. There are a number of features of the restructuring which I considered in some detail in the context of class composition that are also potentially relevant to the question of fairness. In particular, AHC members were able to subscribe at a discount for Interim Notes, which will remain in place as part of a single class of New Super Senior Notes with the New Notes, ranking senior to the Existing Notes on enforcement of security. AHC members also provided the backstop (a form of underwriting) in relation to the New Notes in return for a fee of 2.5%, and benefited from the payment of a so-called work fee of 1% of the principal amount of the Existing Notes, and from payment of their advisers' fees. Furthermore, consent fees comprising a so-called early bird fee and a further consent fee, each of 0.5% of the principal amount of the Existing Notes, are payable to noteholders who acceded to the lock-up agreement entered into in July.

22. I concluded in the convening judgment that the Interim Notes were issued in exchange for the funds advanced for them by the relevant AHC members, rather than constituting any form of disguised consideration for the release or variation of rights under the Scheme (see paragraph 61). I concluded that the difference between participating AHC members and other Existing Note holders was in respect of their respective interests rather than rights (see paragraph 62). I also concluded that the advisers' fees were not relevant to class composition because they had been committed to be paid independently of the Scheme. The work fee was relevant, however, as potentially were the consent fees, although in the latter case this was subject to the argument that those fees were available to non-AHC members as well as members of the AHC.

23. As already indicated, I considered the cumulative benefit available from these features in the convening judgment. If all the benefits are taken into account, then, on the basis described in that judgment, which included taking account of the new funds provided and the anticipated returns to maturity, there is an enhancement of 5.1% of total par value for participating AHC members as compared to a non-AHC member who takes up New Notes.

24. When considering questions of fairness, broader questions arise than is the case with class composition, and, in particular, interests as well as rights are potentially relevant. So I think it is relevant to consider the cumulative position on a basis that all benefits are taken into account. However, as I pointed out in the convening judgment, I also need to consider the commercial services (for example, the backstop) that were provided in return for certain of those benefits; and, of course, in relation to the Interim Notes, the fact that new money was advanced.

25. Overall, having regard to the much lower returns expected in a liquidation, and taking account of the overwhelming level of creditor support at the Scheme meeting, together with the fact that that level of support demonstrated an overwhelming majority in favour of the Scheme even if AHC members are excluded (indicating that the decision cannot have been affected by collateral benefits available to AHC members and not to others), I am satisfied that the Scheme is one that could reasonably be approved.

Jurisdiction

26. I now turn to questions of jurisdiction. I considered jurisdiction briefly in the convening judgment, where I concluded that there was no obvious roadblock to prevent a convening order from being made.

27. The Company is incorporated in England, and the court clearly has jurisdiction over it on that basis.

28. The Company became a co-obligor under a consent solicitation process with the express purpose of being in a position to propose the Scheme. That does not undermine the court's jurisdiction: see, for example, *Re Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch) at [18] (where the Group adopted a similar technique to promote an earlier Scheme); and also *Re NN2 Newco Limited* [2019] EWHC 1917 (Ch) at [29]. I take into account the expert evidence that the Company has validly acceded to the indenture governing the Existing Notes as a matter of New York law.

29. Nothing has emerged since the convening hearing that casts any doubt on my initial conclusion that the court has jurisdiction over the Company, and that the fact that the Group has engaged in what

might be described as "forum shopping" does not prevent the court from exercising its jurisdiction to sanction the Scheme.

30. There is a separate question as to whether the court has jurisdiction over Scheme creditors. For this purpose, I have, as is usual, assumed without deciding that the Recast Judgments Regulation (Regulation (EU) 1215/2012) applies, which involves treating Scheme creditors as persons sued by the Company and therefore as defendants.

31. I am satisfied, on that basis, that Article 8 of the Recast Judgments Regulation would apply. That allows a person domiciled in a Member State to be sued in the courts for the place where any one of the defendants 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. Updated information is now available, derived from the Account Holder Letters submitted by Scheme creditors in order to vote on the Scheme, to the effect that at least 35 of the Scheme creditors, holding in excess of €101 million and $59 million of Existing Notes by value, are domiciled in England, amounting to around 20% by value of Scheme claims overall. On that basis, Article 8(1) is clearly satisfied, irrespective of whether or not it is the case that Article 8 requires some minimum level of creditors to be domiciled in England, or whether it is sufficient for a single creditor to be domiciled in the jurisdiction, as has been debated in some earlier cases, for example *Re Lecta Paper UK Limited* at [48].

32. Finally on jurisdiction, I need to consider whether the Scheme will have a substantial effect, because the court will not generally make an order which does not have such an effect: see *Re Magyar Telecom BV* [2014] BCC 448 at [16], per David Richards J.

33. The Group has obtained independent expert evidence that the Scheme will be recognised in the United States, where its application under Chapter 15 of the US Bankruptcy Code is due to be heard on 9 October, and that it should also be recognised, either directly or as a consequence of the grant of relief under Chapter 15, in Argentina, Mexico, Spain, Panama, Luxembourg and Italy. These

comprise all key jurisdictions. The US is relevant because the Existing Notes are governed by New York law, and in addition some Scheme creditors are expected to be US persons. I note that Chapter 15 recognition is also a waivable condition of the restructuring being completed. Luxembourg is relevant principally because Codere Finance is incorporated there. Other jurisdictions are relevant as being key operating jurisdictions or jurisdictions where Group companies that are key guarantors are incorporated.

34. The expert evidence is not evidence on which I need to reach a final conclusion, but its existence provides sufficient support for the conclusion that the Scheme is likely, or at least will have a real prospect, of having a substantial effect.

35. In addition, it is of some relevance to take account of the level of support for the Scheme, and in particular the level of lock-up. I am informed that as of today's hearing 82.8% by value of Scheme creditors are locked up. That is relevant because the terms on which they are locked up include some very broad undertakings to support the transaction, making it very unlikely (or impossible, in fact, without breaching those undertakings) for those creditors to take action in any of the relevant jurisdictions to challenge the effectiveness of the Scheme. I note that the level of support for the Scheme was relied on by David Richards J, in addition to the expert evidence, in *Re Magyar Telecom BV* at [26].

36. In summary, I am satisfied that there is sufficient evidence that the Scheme will have a substantial effect.

Sanction

37. In all the circumstances, I have decided that it is appropriate to make an order sanctioning the Scheme, and I accordingly do so.