Werksmans

Brendan Olivier

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **17327 / 2020**

In the application between:

TREVO CAPITAL LTD	Applicant / Intervening Party

and

HAMILTON BV	First Respondent
HAMILTON 2 BV	Second Respondent
STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Third Respondent

In re the matter between:

HAMILTON BV	First Applicant
HAMILTON 2 BV	Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Respondent

FILING SHEET

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BE PLEASED TO TAKE NOTICE THAT the Applicant presents herewith for filing its replying affidavit deposed to by Johann-Dirk Enslin:

DATED at **CAPE TOWN** on this 5th day of **MARCH 2021.**

BOWMAN GILFILLAN INC

Per: _____
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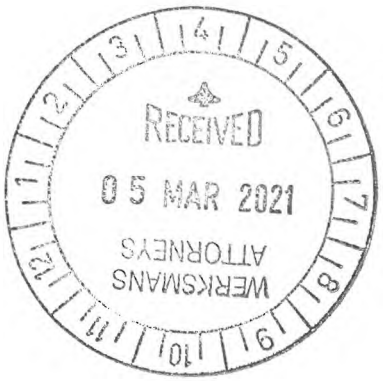

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and

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REPLYING AFFIDAVIT

I, the undersigned,

JOHANN-DIRK ENSLIN

do hereby make oath and say that:

1. I am an adult male chartered accountant residing at 1 Rustic Road, Gardens, Western Cape Province. I deposed to the founding affidavit in this application. I remain duly authorised to depose to this affidavit on behalf of the Applicant ('**Trevo**'). In this regard, I annex hereto marked "**JE9**" a copy of the written resolutions adopted by Trevo's directors on 1 March 2021 which confirm that I am duly authorised to depose to this affidavit on Trevo's behalf, and was likewise duly authorised to depose to the founding affidavit.

2. The facts contained herein fall within my personal knowledge, unless otherwise stated or appears from the context, and to the best of my belief are true and correct. Where I make legal submissions, I do so on the advice of Trevo's legal representatives, which advice I believe to be true and correct.

3. I depose to this affidavit in reply to the answering affidavit deposed to by Louis Jacobus du Preez ('**Du Preez**'), on behalf of the Third Respondent ('**SIHPL**'), which affidavit I have read. In doing so, I employ the same abbreviated terms as in the founding affidavit.

4. All allegations in the answering affidavit which are inconsistent with the contents of the founding affidavit and this affidavit are denied.

5. Furthermore, my failure to deal with any specific averment or contention in the answering affidavit must not be understood as a concession of the correctness of such averment or contention. Many of the averments in the answering affidavit are irrelevant for the limited purposes of this intervention application.

6. I therefore reply as follows:

6.1. First, I deal with four central issues raised in the answering affidavit.

6.2. Second, I address six issues raised in the answering affidavit which appear to be red herrings – in essence an attempt, via a series of irrelevant, misleading and *ad hominem* assertions, to distract attention from the essential issues in this intervention application.

6.3. Finally, I briefly reply *ad seriatim* to further paragraphs of the answering affidavit, to the extent necessary.

SIHPL'S SECTION 155 PROPOSAL NOW PUBLISHED

7. Before turning to the central issues, I note that after Trevo served this intervention application on SIHPL, SIHPL nevertheless decided to press ahead and publish its section 155 proposal (answering affidavit, paragraph 120).

8. In the first instance, I am advised and submit that the fact that SIHPL chose to proceed in this way, rather than to await the outcome of the outstanding intervention and declaratory applications, should have no impact on the determination of either application. SIHPL did so at its own risk and cannot rely upon the fact that it has now placed a defective proposal before creditors as a basis to argue that this Court cannot or should not intervene at this stage.

9. At the time the intervention application was prepared and instituted, Trevo was in possession of a draft of SIHPL's section 155 proposal, but was bound by a non-disclosure agreement, which it concluded with SIHPL on or about 4 March

2020, not to publish any part of that draft proposal. For this reason, the founding affidavit refers to the Term Sheet, rather than the draft section 155 proposal.

10. Moreover, it was unclear, at the time this intervention application was instituted, whether or when SIHPL would publish a final section 155 proposal, and whether the published version would reflect the approach proposed in the Term Sheet or instead depart from that approach to a greater or lesser degree.

11. Given the criticisms contained in the Hamilton declaratory application, which was instituted on or about 20 November 2020 and originally set down for hearing on 8 or 9 February 2021, as well as the criticisms expressed in the founding affidavit in this intervention application, it was possible that SIHPL would choose not to publish a section 155 proposal reflecting the approach proposed in the Term Sheet.

12. However, it has now transpired that the terms of the published section 155 proposal do closely reflect the approach proposed in the Term Sheet.

13. Accordingly, the *prima facie* case set out in the founding affidavit – namely, that the classes of creditor contemplated by the Term Sheet cannot constitute a lawful *'class of creditor'* in terms of section 155 and thus a proposal based on such classes is not sanctionable by a court – applies with equal force to the published section 155 proposal.

14. A copy of the published section 155 proposal (which runs to some 235 pages) is not in the Court papers. I am advised that it is not necessary for me to annex

a copy to this replying affidavit, as the proposal is public and a copy will be placed before the Court for purposes of reference to it in argument.

15. The section 155 proposal contains additional provisions that render it not sanctionable by a court, for example the treatment of Mayfair Speculators Proprietary Limited's claim. These will be addressed, to the extent required, in Trevo's answering affidavit in the declaratory application, if leave to intervene is granted.

FIRST CENTRAL ISSUE: TREVO'S STANDING TO INTERVENE

16. Turning to the first central issue, SIHPL asserts that Trevo has no *locus standi* in the declaratory application on the basis that it is *'unable to demonstrate that it holds a valid and legally cognisable claim against SIHPL'* (answering affidavit paragraphs 5.3, 55 and 66).

17. However, SIHPL contradicts itself by repeatedly conceding that claimants in terms of the section 155 proposal, which include Trevo, have an interest in the relief sought in the declaratory application (answering affidavit, paragraphs 12, 22, 38, 121). At paragraph 130, moreover, it is simply stated that *'SIHPL does not deny that Trevo, like every claimant, has a direct and substantial interest in the Hamilton Declaratory Application'*.

18. It must therefore be accepted, based on SIHPL's explicit concession, that Trevo's standing to intervene in the declaratory application is not genuinely in dispute.

19. The only purported basis advanced by SIHPL to justify its averment that Trevo has no valid and legally cognisable claim against SIHPL is an appeal to the *De Bruyn* judgment.

20. I am advised that this is not an issue that arises for decision in the intervention application.

21. Nonetheless, I am further advised that SIHPL is plainly mistaken in this regard, for at least the following reasons:

    21.1. First, the cause of action pleaded by the Market Purchase Claimants in the *De Bruyn* case was (*inter alia*) for purely economic loss suffered as a result of buying or retaining SIHPL shares due to negligent misrepresentations on the part of SIHPL's directors. The *De Bruyn* judgment made no findings in respect of the distinguishable cause of action pleaded by Trevo, namely for loss occasioned by an intentional misrepresentation attributable to SIHPL itself, as opposed to by Mr Markus Jooste in respect of whom a *'special case'* of fraud was pleaded by the plaintiffs in *De Bruyn* (I refer in this regard to paragraphs 199 and 263 of the *De Bruyn* judgment).

    21.2. Second, SIHPL wrongly assumes that delictual and statutory causes of action (such as those pleaded by Trevo, BVI, and the Cronjé plaintiffs) lie against SIHPL, in respect of losses suffered as a result of reliance upon intentional misstatements attributable to SIHPL, *only if* there was a contractual nexus between SIHPL and the claimant in question (answering affidavit paragraph 141). On the contrary, while such a past

contractual nexus may be *sufficient* to establish a *'special factual relationship'* for the purposes of delictual and statutory claims, such a nexus is not *necessary* in order to do so. Instead delictual liability arises independently from any contract between plaintiff and defendant and typically flows from *non*-contractual forms of interaction, as does liability for breach of statutory duty. I am advised that there is no closed list of special factual relationships, and no basis for SIHPL's wrong assumption that a contractual nexus is required.

22. Trevo has sound delictual and statutory claims against SIHPL for approximately R2.15 billion, which claims are on the cusp of being certified as *'trial-ready'*. Certification has been delayed only as a result of a pending appeal by SIHPL on an interlocutory point, namely an appeal against a finding by this Court that the third party claim pleaded by SIHPL against Mr Markus Jooste should be separated from Trevo's action against SIHPL.

23. It appears that SIHPL hopes to avoid answering Trevo's claims in court, and thereby hopes to avoid genuine legal accountability. It attempts to do so by denying any liability to Trevo, delaying the trial proceedings for as long as possible, and in the meantime shoe-horning Trevo's claim into a section 155 proposal based on classes that cannot constitute lawful *'classes of creditor'* in terms of section 155.

SECOND CENTRAL ISSUE: TREVO'S *PRIMA FACIE* CASE

24. SIHPL asserts that Trevo fails to make out a *prima facie* case because the three classes in its published section 155 proposal are *'clearly appropriate'* and can be contested on *'no possible basis'* (answering affidavit, paragraph 5.2).

25. This is denied.

26. Whether Trevo has made out a *prima facie* case is predominantly a legal issue which will be addressed in argument.

27. Trevo's *prima facie* case is set out in paragraphs 43 to 48.3 of the founding affidavit. To that I add the following.

28. First, at paragraph 126 of the answering affidavit, Du Preez revealingly concedes that *'claimants who fall within the Contractual Claimants class are those that meet the definition of that class, and not necessarily because of the nature of their alleged claims in pleadings'* (emphasis added). This shows that SIHPL's class definitions are not – as they should be – based upon the nature of the rights of the claimants (for example, rights to delictual and statutory compensation) but instead are based on SIHPL's arbitrary classifications.

29. As defined by SIHPL in its section 155 proposal, the *'contractual'* (sic) class includes claimants (such as BVI and the Cronjé plaintiffs) who rely only upon delictual and statutory claims. Moreover, for the reason stated above in paragraph 21.2, SIHPL has wrongly assumed that it is necessary to establish a

contractual nexus between plaintiff and defendant in order to establish a *'special factual relationship'* for the purposes of SIHPL's delictual or statutory liability.

30. Second, the unilateral, quasi-judicial role adopted by SIHPL in classifying claimants into these classes is clearly illustrated by its unjustified assertions that (*i*) Trevo has no cause of action (as dealt with above), (*ii*) Trevo seeks an *'undue commercial benefit'* (answering affidavit, paragraph 53), and (*iii*) Trevo merely *'hold themselves out as creditors'* because *'their claims have not been verified'* by SIHPL itself (answering affidavit, paragraph 26).

31. Trevo respectfully disagrees and submits that it should not be denied its opportunity to raise fundamental objections, in the context of the declaratory application, to a section 155 process based upon classes that are unsanctionable.

THIRD CENTRAL ISSUE: NOTICE OF THE DECLARATORY APPLICATION TO OTHER CREDITORS OF SIHPL

32. In prayer 4 of the notice of motion in this intervention application, Trevo seeks an ancillary order that SIHPL notify its creditors and potential creditors, to whom it gave notice of the section 155 proposal, of the declaratory application and this intervention application. The purpose of such an order would be to ensure that other SIHPL creditors are afforded a fair opportunity to intervene in the declaratory application, if they wish to do so, just as Trevo is currently seeking to do.

33. SIHPL complains that this prayer is *'incompetent'* because Trevo, as applicant, is responsible for notifying all the necessary persons (answering affidavit, paragraphs 5.4.1 and 39). SIHPL also repeatedly complains that Trevo has not done so (paragraphs 23, 26, and 130), suggesting that Trevo is *'well aware of which parties are required to be given notice'* (paragraph 40).

34. Yet SIHPL again contradicts itself by opining that *'many thousands'* fall within the MPC class (paragraph 72.2). It also refers to *'tens of thousands of alleged claimants'* (paragraph 157.1).

35. It is therefore obvious that the only practical way to notify those parties with a real and substantial interest in the declaratory application is via prayer 4 or a similar arrangement.

36. To be clear, Trevo denies that it was required to give notice of the present intervention application to all those parties with a real and substantial interest in the declaratory application, other than SIHPL and Hamilton. The intervention application does not itself give rise to any substantive relief vis-à-vis SIHPL, Hamilton or any other interested party. It merely makes Trevo a participant in the main litigation. What is required is that the declaratory application be brought to the attention of the said parties. At the same time, notice should be given of the (by then successful) intervention application. Thereafter any interested party will have full information as to the status of the declaratory application and the parties thereto, and will be in a position to intervene themselves, should they see fit.

37. Trevo acknowledges that the giving of notice as required by paragraph 4 of the notice of motion will carry a cost to SIHPL. It is willing to contribute to the costs of such notification on a basis to be agreed with SIHPL.

FOURTH CENTRAL ISSUE: ALLEGED PREMATURITY OF INTERVENTION APPLICATION

38. SIHPL asserts that *both* the declaratory application and the intervention application are premature (answering affidavit, paragraphs 14 and 25.5). By this it appears to mean that the bringing of an application (and an intervention in such an application) aimed at remedying defects in a section 155 proposal, even before the envisaged meetings of creditors are convened, is *per se* impermissible.

39. Trevo denies both assertions.

40. Reasons why the declaratory application is not premature are set out at paragraphs 53 to 56 of the founding affidavit and will be expanded upon in argument.

41. The fact that the court may still be asked not to sanction a section 155 proposal after it has been voted upon does not mean that an interested party should not be entitled to ask the court to stop what will be a wasteful and pointless exercise because of the defective selection of classes of creditor. Tying the hands of the court so that it cannot exercise supervision over the process even at the current stage would be inimical to the scheme of section 155.

42. Moreover, I am advised that whether the declaratory application is premature is not an issue to be decided in the intervention application. It must be decided only by the court seized with the declaratory application, which is to be heard separately from, and subsequent to, the hearing of the intervention application. That court will do so either with or without the participation of Trevo, depending on whether Trevo is granted leave to intervene and to participate at that stage.

43. Therefore, it would not be competent for a court seized only with the intervention application to decide whether the declaratory application would be premature. That is an issue upon which Hamilton – and any other entity that chooses to intervene pursuant to the aforementioned notice – is entitled to make submissions when the declaratory application is heard.

44. It stands to reason that the intervention application itself is not premature. Trevo could not be expected to wait any longer before applying to intervene. It did so on 4 February 2021, as soon as possible after obtaining a copy of the declaratory application on 25 January 2021, which was originally set down for hearing on 8 or 9 February 2021. The urgent circumstances are described in paragraphs 58 to 74 of the founding affidavit. I note that SIHPL has now, for all practical purposes, conceded the issue of urgency.

SIHPL'S "RED HERRING" ARGUMENTS

45. I now turn to briefly address the six issues raised in SIHPL's answering affidavit which appear aimed at distracting from the essential issues in this intervention application.

(i) **Red herring 1: application an abuse?**

46. SIHPL repeatedly asserts that the declaratory application and intervention application amount to an abuse, because these applications are intended to frustrate the section 155 process at the expense of other claimants with a view to achieving their own commercial benefit (I refer for example to the answering affidavit, paragraphs 13, 25.6. 54 and 72.2).

47. I am advised that this is not an issue that arises for decision in the intervention application.

48. In any event, SIHPL's assertion is misconceived:

48.1. First, as mentioned above, the declaratory and intervention applications were instituted at a time when no section 155 proposal had yet been published, and it was unclear whether or when SIHPL would publish a finalised section 155 proposal, nor whether any published version would reflect the approach proposed in the Term Sheet or instead depart from that approach to a greater or lesser degree.

48.2. It was SIHPL that decided to go ahead and publish the section 155 proposal, after receiving service of the declaratory and intervention applications, but before these applications could be determined quickly and efficiently by the urgent court. Therefore, it is SIHPL that is responsible for the status quo.

48.3. Second, Trevo is fully aware of the need for others to be afforded the opportunity to participate in proceedings in which they have a legitimate legal interest, hence the relief sought in prayer 4 of the notice of motion.

48.4. Third, Trevo is seeking to exercise a right to challenge the legitimacy of the section 155 proposal as formulated by SIHPL. If, as a matter of law, the proposal is defective, none of the other claimants has any right or expectation to vote on it. If a case is made for the relief sought in the declaratory application, there can be no suggestion that the court's process is being abused.

(ii) Red herring 2: circumvention of sec 155 process?

49. SIHPL repeatedly asserts that the declaratory and intervention applications effectively require this court to ignore or circumvent the statutory process envisaged by section 155 (answering affidavit, paragraphs 14 and 52).

50. This too is not an issue that arises for decision in the intervention application. Instead, I am advised it is for the court seized with the declaratory application in due course.

51. Furthermore, SIHPL'S assertion is again misconceived:

51.1. On the one hand, if Trevo is granted leave to intervene and in due course successfully obtains a declaration that the classes do not constitute a *'class of creditor'* in terms of section 155, then Trevo would have prevented a pointless and wasteful exercise. Moreover, Trevo

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would apparently have prevented the liquidation of SIHPL, which according to the Steinhoff Group is overwhelmingly likely were its proposal to fail in court in terms of section 155(7). Prevention is better than cure, especially where cure is, according to the Steinhoff Group, impossible.

51.2. On the other hand, if Trevo is unsuccessful, all claimants will have a full opportunity to exercise their statutory rights.

51.3. Either way, SIHPL's hyperbolic complaint misses the mark.

(iii) <u>Red herring 3: Trevo selfish and motivated by purely by money?</u>

52. SIHPL asserts that Trevo is selfish and is motivated purely by money (answering affidavit, paragraphs 25.3, 25.6, 26, 49.18, 71, and 117).

53. SIHPL's crude *ad hominem* assertions are irrelevant to the relief sought in the intervention and in the declaratory application, as well as being inappropriate and untrue.

54. Trevo's motive in bringing the intervention application and in seeking the relief in the declaratory application is to avoid a defective section 155 process playing out. That is in the interests of justice.

55. It is naturally Trevo's intention to protect its financial position in so doing. The notion that it is *'self-serving'* of Trevo to seek more than the *de minimis* compensation (between 4 and 6.6 cents in the Rand offered to MPC claimants in terms of the sec 155 proposal) for losses of over two billion rand that it has

suffered as a direct result of its reliance upon intentional misrepresentations attributable to SIHPL, needs only to be stated to be rejected.

56. Instead Trevo is seeking justice and recompense as victims of an extraordinary corporate fraud perpetrated by SIHPL. Trevo has a legitimate claim for relief against SIHPL which is it actively pursuing, and which it wishes to bring to completion.

57. As things currently stand, SIHPL is however attempting to avoid legal accountability to Trevo (*i*) by denying any liability to Trevo on the basis of a misreading of *De Bruyn* and an erroneous assumption that a contractual nexus is required for delictual and statutory liability, (*ii*) by delaying the pending trial proceedings instituted by Trevo for as long as possible (initially by a failed consolidation application, and presently by way of an appeal against an interlocutory finding), and (*iii*) in the interim by attempting to shoe-horn Trevo's claim into a statutory compromise based on classes that are not a *'class of creditor'* in terms of section 155.

(iv) <u>Red herring 4: safeguarding jobs?</u>

58. SIHPL then attempts to contrast SIHPL's alleged selfishness with the need to *'safeguard the jobs of the thousands of employees of the Steinhoff Group's underlying businesses'*, which Trevo is said to threaten (answering affidavit, paragraphs 49.10, 49.17, and 53).

59. This rhetorical assertion is baseless.

60. Trevo is not responsible for any risk to Steinhoff jobs, if any such risk exists. It is the Steinhoff corporate fraud that has placed the Group in its present position. Trevo is merely seeking to advance its legal rights, as it is entitled to do. It cannot be precluded from doing so because of a fear that there will be detrimental consequences within the Group if a defective section 155 proposal put up by it fails.

61. In any event, SIHPL in fact employs very few people. The overwhelming bulk of employees in the Steinhoff Group work for Pepkor South Africa and Pepkor Europe, and in other subsidiaries. The employment position of employees in an operating subsidiary is obviously not automatically affected by any misfortunes befalling its holding company. Pepkor has had many different ownership structures over the last 20 years and these changes of ownership had no impact on Pepkor's employees.

62. Were SIHPL to be liquidated, there is no prospect that Pepkor would also be liquidated. Pepkor has no exposure to SIHPL, having settled its historical indebtedness. In any event, Pepkor's business is thriving.

(v) <u>Red herring 5: Trevo seeks an order moving it to the Contractual Claimant Class?</u>

63. SIHPL then asserts that Trevo seeks, by way of these proceedings, to be moved from the MPC class to the Contractual Claimant class (answering affidavit, paragraphs 25.6.2, 73, and 82-83) and refers in this regard to paragraph 6.1.1 of a letter of 20 January 2021 written by Trevo's attorneys to SIHPL's attorneys, which letter is attached as annexure *'C'* to the answering affidavit.

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64. SIHPL also repeatedly asserts that Trevo is attempting, by way of these proceedings, to *'amend'* the section 155 proposal, and observes that a court has no power to order such an amendment (answering affidavit, paragraphs 50.2, 73, 77, 84-85, and 90).

65. But these are yet further red herrings:

65.1. First, SIHPL misrepresents the nature of Trevo's case. If Trevo is granted leave to intervene in the declaratory application, it seeks only a declaration that SIHPL's proposed classes do not constitute a *'class of creditors'* in terms of section 155, for the reasons foreshadowed in the founding affidavit and above. Trevo does not seek an order that it should be moved from one section 155 class to another, nor an order amending the section 155 proposal. Trevo is well aware that this court is not empowered to do either in these proceedings.

65.2. Second, the letter relied upon by SIHPL (annexure *'C'* to the answering affidavit) in fact proposed three, mutually-exclusive alternatives on behalf of Trevo in paragraphs 6.1.1, 6.1.2 and 6.1.3. Trevo would prefer not to be placed in any of the proposed classes (nor to be moved from one class to another), but instead (as was proposed in paragraph 6.1.3 of the letter) to be treated as a Non-Qualifying claimant, so that it can pursue its action proceedings and have its day in court. Given SIHPL's confident refrain that Trevo has no cause of action against it by virtue of the *De Bruyn* judgment, presumably SIHPL should welcome this

option and place it in the Non-Qualifying class. It is revealing that SIHPL has not been willing to do so.

65.3. Third, SIHPL also fails to explain the context of the letter upon which it relies. The letter was written and sent at a date (20 January 2021) before the section 155 proposal was published, as well as before Trevo, or its representatives, were able to obtain a copy of the Hamilton declaratory application which (as I explained in paragraph 69 of the founding affidavit) Ms de Hutton obtained only on 25 January 2021. The letter critiqued the apparent treatment of Trevo in the Term Sheet and indicated that, were none of its proposals taken up, Trevo would oppose a section 155 proposal that reflected the approach of Term Sheet. SIHPL has accordingly distorted the meaning of this letter, and ignored part of its content and its clear intent, to serve its own purposes in these proceedings.

(vi) Red herring 6: increase of Contractual Claimant "pot"?

66. Having wrongly attributed to Trevo a motivation to seek via these proceedings an amendment of the proposal by being moved into the Contractual (sic) Claimant class, SIHPL then attributes to Trevo an allegedly 'speculative' assumption that were Trevo so reclassified, the total settlement 'pot' available to the Contractual Claimant class should be increased by SIHPL so that such claimants, including BVI and the Cronjé plaintiffs, should not be paid any less (answering affidavit, paragraphs 74.3, 79, 82 and 83 and 167.1).

67. In this regard, SIHPL again attempts to make much of but one of three proposals contained in the letter of 20 January 2021, namely that should Trevo be placed in the Contractual Claimant class, SIHPL should allocate sufficient funds to the settlement of this class so as not to dilute the settlement consideration to be received by the remaining CC class claimants.

68. At paragraphs 83.3 and 91 of the answering affidavit, SIHPL specifically takes issue with Trevo's failure to suggest *'from where the additional funds that are to be "allocated" should be sourced'* and its silence on *'how the funding (of its migration) is to be met'*. Further, at paragraph 167.1, SIHPL indicates that it *'has no intention to increase the total settlement amount proposed in terms of the section 155 proposal'*.

69. SIHPL's vehement objection to the Trevo's proposal that additional funds be allocated to the CC class is at odds with recent developments in the Steinhoff Group's dispute with Conservatorium Holdings LLC ('**Conservatorium**'), described more fully below.

70. Conservatorium sought to attack the Steinhoff Group's global settlement process in primarily two ways:

    70.1. by opposing the application of Steinhoff International Holdings NV ('**SIHNV**') for an order pursuant to section 899 of the Companies Act 2006 of England and Wales sanctioning a proposed scheme of arrangement (the '**UK scheme**') (the '**sanctioning application**'); and

70.2. by making application to the Amsterdam District Court to appoint a restructuring expert to SIHNV pursuant to Article 371 of the Dutch Bankruptcy Act (the '**Dutch application**'), which application, if granted, would have precluded the launching of the Steinhoff global settlement process.

71. The sanctioning application was heard on 26 and 27 January 2021 in the High Court of Justice, Business and Property Court of England and Wales under case number CR-2020-004268.

72. On 5 February 2021, judgment in the sanctioning application was given by Mr Justice Johnson in favour of SIHNV and the proposed UK scheme was approved. A copy of the judgment, which also provides a useful summary of Conservatorium's arguments against sanctioning, is annexed hereto marked "**JE10**".

73. On 15 February 2021, the date scheduled for the hearing of the Dutch application, SIHNV published a JSE SENS announcement indicating that *'following a number of constructive engagements ... an agreement has been reached, in principle, between, among others, SIHNV, SIHPL, Conservatorium and certain entities linked to Christo Wiese'*. The announcement further provided that one of the conditions of the agreement was that Conservatorium would withdraw the Dutch application. The SENS announcement is annexed hereto marked "**JE11**".

74. Following the SENS announcement of 15 February 2021, the section 155 proposal was published to SIHPL's creditors on 16 February 2021. Paragraphs

1.35 and 1.36 of the proposal describe the Conservatorium settlement. In particular, paragraph 1.36.2 of the proposal reveals that SIHPL, together with SIHNV and SAPHL, has agreed to settle the Conservatorium Claims for an amount of € 61 million (approximately R 1.1 billion).

75. As of 27 January 2021, Conservatorium had continued to oppose the Steinhoff global settlement process. Yet, a mere 18 days later, Conservatorium had agreed *inter alia* to withdraw the Dutch application in exchange for a settlement consideration of over R1 billion.

76. It is important to note that, in terms of the draft section 155 proposal distributed by SIHPL on 19 January 2021, the *Conservatorium Claims were treated as Non-Qualifying Claims* and thus were excluded from the section 155 settlement process altogether. Clearly, no prior funds had been earmarked for Conservatorium. I annex in this regard marked "**JE12**" a copy of the relevant extracts from the draft proposal.

77. SIHPL's ability to source over R1 billion in additional funds to include in its section 155 settlement 'pot' in such a short timeframe gives the lie to the notion that it is unable to source additional funds to allocate to the Contractual Claimant class. SIHPL's behaviour shows that its objection to Trevo's proposal that additional funds be allocated to the CC class is contrived.

78. The facts that (*i*) SIHPL was in a position to source a further R1 billion to settle a claim that was until recently classified as 'Non-Qualifying' in such a limited timeframe, and (*ii*) SIHPL has failed to provide a cogent reason why the same

could not be done for Trevo, cast doubt upon the sincerity of SIHPL's objections to Trevo's proposal.

79. Be that as it may, Trevo's proposal that it be placed in the Contractual Claimant class, with an increased total settlement amount in that class, was only one of three suggestions put forward to Steinhoff in the letter of 20 January 2021, which letter was sent to SIHPL within a specific context, as explained above.

80. In any event, all of the above is irrelevant to the question that will occupy the court in considering the declaratory application, namely whether the proposed classes of creditor are *per se* competent within the framework of section 155. If that is not the case, then SIHPL will have to alter the proposal to address this. It is not for this court to say how that should be done.

AD SERIATIM

81. I now reply to selected paragraphs in the answering affidavit, to the extent necessary.

Ad paragraph 49

82. In this lengthy background section, SIHPL emphasises what it regards as the merits and advantages of the section 155 process. The purpose of Trevo's intervention application is to have an opportunity to contend that the section 155 proposal is fatally defective. The advantages which SIHPL perceives cannot prevail over compliance with the law.

Ad paragraph 57

83. I deny that these paragraphs accurately summarise Trevo's delictual and statutory claims against SIHPL.

84. For example, this paragraph refers to the English tort law concept of a *'duty of care'*, which is not relied upon in Trevo's particulars of claim (I refer to annexure JE4 to the founding affidavit), and which I am advised has repeatedly been criticised by our courts.

85. Trevo's pleaded claim is based primarily on SIHPL's intentional misrepresentations.

86. In short, SIHPL here misrepresents the nature of Trevo's delictual and statutory claims in a transparent attempt to promote the false notion that they are precluded by the *De Bruyn* judgment.

Ad paragraph 70

87. SIHPL suggests that it proposes to settle with members of the MPC class, notwithstanding its firm belief that none of these class members have any cause of action against SIHPL by virtue of the *De Bruyn* judgment, *'only for the purposes of finality and out of an abundance of caution'*.

88. This assertion is contrived insofar as SIHPL applies it to Trevo.

89. Were SIHPL truly of the belief that Trevo had no cause of action, it would move Trevo into the Non-Qualifying class. It has refused to do so.

90. The reason, I suggest, is obvious. SIHPL is well aware that if Trevo's action proceedings run their course, Trevo is likely to obtain judgment against SIHPL for approximately R2.15 billion. SIHPL is taking every step available to it in an attempt to avoid this.

Ad paragraph 90

91. Trevo does indeed seek to halt the present proposal on the basis that it is defective and could not be sanctioned in its current form. If the declaratory application succeeds, it will be for SIHPL to decide what its next step will be. It will of course be guided by the basis upon which the court would have granted the declaratory relief.

Ad paragraph 106.2

92. I deny SIHPL's assertion that were Trevo's claim to succeed then *'<u>any</u> party that acquired shares from a Contractual Claimant could claim to stand in its shoes'*.

93. What SIHPL disregards here is that the special circumstances of Trevo's case, as set out in the founding affidavit, distance its claim materially from that of the Market Purchase claimants and render it inappropriate for Trevo to consult with those claimants in a section 155 class. Its claim, if anything, is more akin to those of the Contractual Claimants, which likewise arose in the context of specific arrangements entered into with SIHPL. The manner in which the SIHPL shares were transferred from Treemo to Trevo ensured that they remained under the same ultimate ownership as beforehand, to SIHPL's knowledge. There was accordingly still a clear link between Trevo's ownership of the shares

and the contractual basis upon which they were acquired from SIHPL, which differentiates them from the Market Purchase claimants.

Ad paragraph 112

94. I deny that Trevo agrees in general terms with the classing envisaged in the section 155 proposal, save for Trevo's *'placement'* therein. Trevo's *prima facie* case, as set out in the founding affidavit, is based on fundamental criticisms of the classing as a whole.

Ad paragraph 123

95. SIHPL here limply suggests, in a revealing turn of phrase, that SIHPL's *'financial performances and results may not have been as represented'* (emphasis added), while simultaneously denying its own fraud.

96. It is SIHPL here which is trying, unsuccessfully, to *'thread the needle'* (I refer to the answering affidavit, paragraph 109 by way of comparison). In SIHPL's own particulars of claim against Messrs Jooste and Le Grange (which is annexure RA7 to Hamilton's replying affidavit in the declaratory application), which are signed by its counsel, SIHPL in fact pleads a claim based on *'fictitious transactions'* and *'accounting irregularities'* which had *'the result of substantially, and artificially, inflating the profit and asset values'* of SIHPL, the financial position of which was *'materially overstated and required restatement'*.

Ad paragraph 133

97. In terms of the section 155 proposal, the Financial Creditors' claims will not be compromised in the sense that it is proposed that they will receive 100 cents in the rand, unlike members of the Contractual (sic) Claimants class and the MPC class.

Ad paragraph 138

98. I deny that Trevo's position with respect to the relief sought in the declaratory application is unclear. As stated in paragraph 48.5 of the founding affidavit, if Trevo is granted leave to intervene, it will submit that each of the proposed classes fail to constitute a legitimate *'class of creditors'* as envisaged in section 155.

Ad paragraphs 148 and 163-7

99. SIHPL here denies its obvious *'divide and rule'* strategy.

100. That strategy is based on the false notion that SIHPL can only be liable in delict and under the Companies Act to those who suffered loss as a result of their reliance on intentional misrepresentations attributable to SIHPL, where there was previously a contractual nexus between SIHPL and the claimant in question.

101. SIHPL's *divide and rule'* strategy is clear to see in (*inter alia*) paragraphs 74.2, 76, 80, 89 and 91-2 of its answering affidavit, where SIHPL attempts to drive a wedge between Trevo, BVI, and the Cronjé plaintiffs. SIHPL even goes so far

as to insinuate (but not explicitly to allege) that it may be inappropriate for Bowmans to represent all of these plaintiffs.

102. In paragraphs 163-167, moreover, SIHPL attempts to cast doubt on the unequivocal support expressed for Trevo's application by BVI and the Cronjé plaintiffs. SIHPL does so on the self-serving basis (articulated in paragraph 167.1) that it *'has no intention to increase the total settlement amount proposed in terms of the section 155 proposal'*.

103. I have already explained above how SIHPL's conduct in relation to Conservatorium gives the lie to the notion that it is unable to source additional funds when necessary.

104. Thus, once again, SIHPL's transparently attempts to divide Trevo, BVI, and the Cronjé plaintiffs, and does so by way of a baseless assertion that is contradicted by its own past conduct.

Conclusion

105. I respectfully reiterate Trevo's claim for the relief set out in the notice of motion.

JOHANN-DIRK ENSLIN

I certify that the above signature is the true signature of the deponent and that he has acknowledged that he knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at **CAPE TOWN** on this 5th day of **March 2021**, in accordance with Government Notice No R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.

COMMISSIONER OF OATHS

Vuyolwethu Yozo
Commissioner of Oaths
Practising Attorney SA
ENSafrica
1 North Wharf Square
Loop Street Cape Town 8001

"JE9"

Trevo Capital Ltd
(Registration number: 091521 C1/GBL)
(Incorporated in Mauritius)

WRITTEN RESOLUTIONS OF THE DIRECTORS OF THE COMPANY DATED 01 MARCH 2021 PASSED IN LIEU OF HOLDING A MEETING OF DIRECTORS IN ACCORDANCE WITH PARAGRAPH 7 OF THE EIGHTH SCHEDULE OF THE COMPANIES ACT 2001.

We, the undersigned, being all the directors of the Company, hereby certify that, in accordance with paragraph 7 of the Eighth Schedule of the Companies Act 2001, the following written resolutions for entry in the minute book be delivered to us in lieu of holding a meeting of directors.

WHEREAS:

(i) The Company has instituted action proceedings against Steinhoff International Holdings (Proprietary) Limited (**Steinhoff**) under High Court of South Africa, Western Cape Division case number 4669/19 (the **action proceedings**), to which Markus Johannes Jooste (**Jooste**) was joined as a Third Party by Steinhoff;

(ii) Judgement was given in the application brought by, *inter alia*, the Company to remove Jooste as a party in the action proceedings on 8 July 2020, wherein Allie J ordered that Steinhoff's claim against Jooste is separated from the Company's claim against Steinhoff in the action proceedings;

(iii) Steinhoff has since sought leave to appeal the judgment of Allie J and has been granted leave to appeal to the Full Bench of the Western Cape High Court, which appeal hearing will be heard on 23 April 2021 (the **Appeal**); and

(iv) The Company wishes to oppose the Appeal and to appoint Bowman Gilfillan Inc. (**Bowmans**) to act on its behalf in all matters related to the opposition of the Appeal.

FURTHER:

(v) Hamilton BV and Hamilton BV 2 have brought an application for a declaratory relief against Steinhoff under High Court of South Africa, Western Cape Division case number 17327/2020 (the **Declaratory Application**);

(vi) The Company has brought an application for leave to intervene in the declaratory application (the **Intervention Application**);

(vii) The Company wishes to appoint Bowmans to act on its behalf in all matters related to the Declaratory Application and the Intervention Application; and

(viii) The Company wishes to authorise Johann-Dirk Enslin (**Enslin**) to sign all such documents and take all such steps as may be necessary in relation to the Declaratory Application and the Intervention Application.

We, the undersigned being the directors of the Company for the time being and entitled to receive notice of meetings of directors, **RESOLVE THAT:**

(a) Bowmans be and is hereby appointed to act on behalf of the Company in the Declaratory Application, the Intervention Application and the opposition of Appeal, and to take such steps, file such papers and take any such action as may be necessary to do so;

(b) Enslin be and is hereby authorised to instruct Bowmans in all matters relating to the Declaratory Application, Intervention Application and the opposition of the Appeal, and to sign any and all documentation and take whatsoever steps as may be necessary in relation to the Declaratory Application, the Intervention Application and the opposition of the Appeal;

(c) Nathoo, in his capacity as a director of the Company, be and is hereby authorised to sign any and all documentation and take whatsoever steps as may be necessary to give effect to resolutions (a) and (b) above, including signing a Power of Attorney in favour of Bowmans; and

(d) To the extent that Bowmans and Enslin have already signed documents, filed papers or taken steps necessary for the opposition of the Appeal and prosecution of the Intervention Application, their actions in this regard be and are hereby ratified.

These resolutions have been adopted by the directors of the Company in writing as of the date first above written, in lieu of a meeting of directors, and shall have the same force and effect as if adopted at a meeting of directors pursuant to the laws of the Republic of Mauritius.

This document may be executed in multiple counterparts, which taken together shall constitute the same instrument.

Daniel William Desmond ROMBURGH

Roshan NATHOO

Ajay Kumar JEETOO

Uday Kumar GUJADHUR

Date: 01 March 2021

We, the undersigned being the directors of the Company for the time being and entitled to receive notice of meetings of directors, **RESOLVE THAT:**

(a) Bowmans be and is hereby appointed to act on behalf of the Company in the Declaratory Application, the Intervention Application and the opposition of Appeal, and to take such steps, file such papers and take any such action as may be necessary to do so;

(b) Enslin be and is hereby authorised to instruct Bowmans in all matters relating to the Declaratory Application, Intervention Application and the opposition of the Appeal, and to sign any and all documentation and take whatsoever steps as may be necessary in relation to the Declaratory Application, the Intervention Application and the opposition of the Appeal;

(c) Nathoo, in his capacity as a director of the Company, be and is hereby authorised to sign any and all documentation and take whatsoever steps as may be necessary to give effect to resolutions (a) and (b) above, including signing a Power of Attorney in favour of Bowmans; and

(d) To the extent that Bowmans and Enslin have already signed documents, filed papers or taken steps necessary for the opposition of the Appeal and prosecution of the Intervention Application, their actions in this regard be and are hereby ratified.

These resolutions have been adopted by the directors of the Company in writing as of the date first above written, in lieu of a meeting of directors, and shall have the same force and effect as if adopted at a meeting of directors pursuant to the laws of the Republic of Mauritius.

This document may be executed in multiple counterparts, which taken together shall constitute the same instrument.

Daniel William Desmond ROMBURGH

Roshan NATHOO

Ajay Kumar JEETOO

Uday Kumar GUJADHUR

Date: 01 March 2021

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"JE 10"

Neutral Citation Number: [2021] EWHC 184 (Ch)

Case No: CR-2020-004268

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST

7 Rolls Building
Fetter Lane
London EC 4A 1NL

Date: 05/02/2021

Before :

MR JUSTICE ADAM JOHNSON

IN THE MATTER OF STEINHOFF INTERNATIONAL HOLDINGS N.V. AND IN THE MATTER OF THE COMPANIES ACT 2006

Mark Arnold QC, Adam Al-Attar and Ryan Perkins (instructed by **Linklaters LLP**) for the **Applicant**
Tom Smith QC and Henry Phillips (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for **Conservatorium Holdings LLC**

Hearing dates: 26 – 27 January 2021

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.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

Introduction

1. Steinhoff International Holdings NV ("*Steinhoff NV*" or "*the Company*") is incorporated in the Netherlands but its principal place of business is in Stellenbosch, South Africa. It is the ultimate holding company of the Steinhoff Group.

2. Steinhoff NV applies for an order sanctioning a creditors' scheme of arrangement ("*the Scheme*") pursuant to Companies Act 2006, section 896. The Scheme relates to two classes of creditors, both lenders under financing documents which I will describe below (I will refer to them as the "*Facility A1 Lenders*" and the "*Facility A2 Lenders*", or together, the "*Scheme Creditors*").

3. The Company issued the required Practice Statement Letter on 4 November 2020, and following a hearing before Sir Alastair Norris on 26 November, Sir Alastair made an Order (the "*Convening Order*") convening two scheme meetings of the Facility A1 Lenders and Facility A2 Lenders to be held on 15 December 2020. Sir Alastair's judgment given on the convening hearing is at [2020] EWHC 3455 (Ch).

4. Meetings of the Scheme Creditors have now taken place, and the vast majority, both in number and value, support the Scheme.

5. As I will explain below, however, a particular issue arises because of an objection to the Scheme by Conservatorium Holdings LLC ("*Conservatorium*"). Conservatorium is not a Scheme Creditor, but says it has a sufficient interest to justify its intervention. That is because the Scheme represents the first step in a more complex overall arrangement designed to achieve a global settlement of many disputes involving the Steinhoff Group (the "*Steinhoff Group Settlement*"). Those disputes arise out of alleged accounting irregularities affecting the Group which first came to light in late 2017, concerning possible overstatements of profits. Conservatorium is pursuing claims relating to the alleged irregularities, and says the proposals for settlement in the Steinhoff Group Settlement involve it being treated unfairly in respect of its claims. It says that because the present Scheme and the Steinhoff Group Settlement are connected, and in effect indivisible (its counsel, Mr Smith QC, used the vivid analogy of there being "*one big ball of wax*"), such unfairness must be relevant for this Court in assessing whether to sanction the Scheme. Indeed it is said to constitute a "*blot*" in the Scheme such that the Scheme should not be sanctioned.

6. A preliminary point was raised by the Company at the hearing before me, as to the standing of Conservatorium to intervene and make an objection at all. The parties agreed, however, that I should hear Conservatorium's submissions as part of an overall presentation of the Company's application for an order for sanction. I therefore agreed to hear Conservatorium's submissions *de bene esse*, on the basis that I would deal in this Judgment with the question of standing and, as necessary, with the substance of its objection. That is the approach adopted below.

Background

7. The Steinhoff Group operates in the household goods and general merchandise sectors. Among the members of the Group are Steinhoff International Holdings Proprietary

Limited ("*SIHPL*") and Steenbok Lux Finco 2 Sarl (referred to as "*SEAG*"). SIHPL is incorporated in South Africa. It is important because (prior to 2015) it was the main holding company in the Group. It is now a subsidiary of Steinhoff NV. SEAG is also a subsidiary company. It is important because it is party to the key financing documents sought to be amended by the present Scheme.

8. The suspected accounting issues announced in late 2017 caused huge turbulence within the Group, including to its relationships with its lenders. Its financing arrangements at the time included Facility A1 and Facility A2, in favour of SEAG. These facilities are governed by English law and contain submissions to the jurisdiction of the English courts.

9. In 2019, a restructuring of the Group's overall indebtedness was achieved (*"the 2019 Restructuring"*). The objective was to buy some breathing space, to allow time to see whether the Group could weather the storm which followed the emergence of the accounting issues I have mentioned. It was hoped that by creating some breathing space, it might be possible for an overall settlement of the many disputes affecting the Group to be negotiated.

10. Among the arrangements affected by the 2019 Restructuring were Facility A1 and Facility A2 with SEAG. A number of changes to those Facilities were brought into effect. The relevant maturity dates were extended, and presently expire in December 2021. Further, by means of a new contingent payment undertaking, referred to as the "*SEAG CPU*", Steinhoff NV gave what is in effect a guarantee (subject to an agreed cap) in respect of SEAG's indebtedness to the Facility A1 and Facility A2 Lenders. Thus, the Facility A1 and A2 Lenders became contingent, unsecured creditors of Steinhoff NV, the promoter of the present Scheme. By means of an intercreditor agreement (*"the SEAG Intercreditor Agreement"*), Facility A2 was subordinated to Facility A1.

11. The Group had other facilities in addition to Facility A1 and Facility A2. The other facilities had the benefit of their own CPUs. The interrelationship between the SEAG CPU and the other CPUs came to be governed by a document known as the "*Umbrella Agreement*".

12. By September 2020, the Company's exposure under the SEAG CPU was €5.5bn and under all CPUs was some €9.8bn.

13. I mention the SEAG CPU and the SEAG Intercreditor Agreement in particular because a key purpose of the present Scheme is to put arrangements in place which will result in their being amended on behalf of the Facility A1 and A2 Lenders. The need to achieve that objective by means of a scheme of arrangement has arisen as follows.

14. As noted, the 2019 Restructuring contemplated that efforts would be made to achieve a global settlement. The package of agreements which gave effect to the 2019 Restructuring set parameters for any settlement, including as to such matters as the settlement sum and the sources of funding for the payment of any such sum.

15. In June 2020, after a year of complex negotiations, the Group announced a proposal for a global settlement. This was the first iteration of the *Steinhoff Global Settlement* already mentioned. There was an issue, however. The proposed terms were outside

the approved parameters required by the 2019 Restructuring, and reflected in the documents I have mentioned. Also, more time was needed, and so the Group looked to extend the maturity dates settled on in the 2019 Restructuring.

16. The documents constituting the 2019 Restructuring contained consent provisions, permitting amendments to be made subject to certain approval thresholds being met. In October 2020, a process of seeking consents was initiated under the relevant contractual mechanisms. The short point is that the relevant majorities were achieved in the majority of cases, but not all. Certain amendments affecting the Facility A1 Lenders and Facility A2 Lenders required unanimous consent, and that was not forthcoming. One Facility A1 Lender (holding 0.05% of Facility A1 by value) declined to give consent, and two of the Facility A2 Lenders (holding 6.6% of Facility A2 by value) voted against the proposed amendments. I understand that those Facility A2 Lenders are associated with Conservatorium.

17. Thus it comes about that the Company seeks to promote the present Scheme. It does so in order to effect amendments to the arrangements in place with the Facility A1 and Facility A2 Lenders, and those amendments are necessary to facilitate implementation of the hoped for Steinhoff Global Settlement. At the heart of the present Scheme is a proposal that authority be conferred on appointed agents of the Scheme Creditors to execute a suite of implementation documents on their behalf, following the practice described by Snowden J. Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch) at [74]-[75].

18. The two key implementation documents are:

    a) An agreement to amend the SEAG CPU ("*the SEAG CPU Amendment Agreement*"), and

    b) An agreement to amend the SEAG Intercreditor Agreement (the "*SEAG ICA Amendment Agreement*").

19. Among the key proposed amendments is an extension of the Maturity Date under the SEAG CPU from 31 December 2021 to 30 June 2023, and a reduction in the consent threshold required to effect further changes to the SEAG CPU and the Umbrella Agreement from "*all Lenders*" to an 80% majority by value.

20. The Scheme also includes a release of the directors of the Company, professional advisers and various other persons from any liability arising out of or in connection with the preparation, negotiation or implementation of the Scheme. Essentially the same provision 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].

21. Finally, I should mention that although there is some uncertainty about the form they will take, the intention is that the present (English) Scheme will need to be followed by other, more extensive restructuring processes in the Netherlands and in South Africa. In the Netherlands, it seems that the likely format will be a Suspension of Payments (*surseance van betaling*) procedure, although Mr du Preez in his evidence has referred to the Company also giving consideration to the new Dutch "*WHOA*" procedure (*Wet homologatie onderhands akkoord*), which became available from 1 January 2021. In

South Africa, what is proposed is a compromise plan pursuant to section 155 of the Companies Act No. 71 of 2008. During the course of the hearing before me, the Company produced a copy of a draft section 155 Proposal recently submitted to the South African Court. This document is consistent with the idea that the corresponding procedure in the Netherlands will be the Suspension of Payments procedure, and Mr Al-Attar, who appeared for the Company, accepted that that was likely to be the case, although I understood the Company's position to be that no final decision had been taken.

22. I should also say for completeness that, not content to wait for Steinhoff NV to make a decision as to the proposed course in the Netherlands, on 4 January 2021 Conservatorium made its own application to initiate the appointment of an independent and impartial restructuring expert under the WHOA procedure. That application is pending, and as I understand it, is likely to be resisted by Steinhoff NV.

Conservatorium

23. At this point, and before summarising the Steinhoff Global Settlement and the features of it which Conservatorium finds objectionable, it is convenient to say something briefly about the claims which Conservatorium says it is entitled to bring against members of the Steinhoff Group.

24. I have been given a great deal of background, but I will do my best to summarise the key points. This comes at some risk of oversimplification, but not at the cost of precision on the key issues, and it is necessary I think in order to explain clearly the very complex and fragmented background.

25. There are two relevant sets of claims. Both have their origin in the acquisition of shares in Steinhoff Group companies, at a time before the accounting issues mentioned above first emerged, and thus at a time when it is alleged that the relevant share prices were artificially inflated. By way of shorthand, I will refer to the two sets of claims as the "*Thibault Claim*" and the "*Upington Claim*" respectively. By that language I mean to include all claims and causes of action arising from the events I will now describe.

26. The background to the claims overlaps. It is convenient to mention the Thibault Claim first. Thibault Square Financial Services Proprietary Limited ("*Thibault*") is a company associated with Dr Wiese, the former Chairman of the Steinhoff Group. In November 2014, Thibault subscribed for 609 million shares in SIHPL, which at the time was the Group holding company. In December 2015, the Group structure changed, and the shares in SIHPL were exchanged for an equivalent number of shares in Steinhoff NV by means of a South African scheme of arrangement. Steinhoff NV became the new Group holding company. Causes of action in misrepresentation and the like are said to have arisen both on the original acquisition of shares by Thibault in 2014, and on the exchange of SIHPL shares for Steinhoff NV shares in 2015. Together these causes of action constitute the *Thibault Claim*.

27. Later, in 2016, another company associated with Dr Wiese, Upington Investments Holdings BV ("*Upington*"), also wished to purchase shares in the Group. The purchase was financed by means of a loan raised in late September 2016 from a consortium of banks. This has been referred to as the "*2016 Margin Loan*." More particularly, this

was a €1.65bn limited-recourse margin loan facility with Upington and an entity called Titan Investment Proprietary Limited ("*Titan*"), also associated with Dr Wiese.

28. Using the 2016 Margin Loan, Upington purchased 314 million shares in Steinhoff NV. Causes of action are also said to have arisen on that acquisition, and it is those causes of action which constitute the Upington Claim.

29. The lenders under the 2016 Margin Loan took security, including from Upington and Thibault. Upington gave security over the 314m shares it acquired using the 2016 Margin Loan, and Thibault gave security over 314m of the shares it by that stage held in Steinhoff NV. Of course, the 314m were only a subset of the 609m Thibault had obtained by means of the 2015 scheme, and according to Mr du Preez's evidence, Thibault's overall holding of shares in Steinhoff NV was even larger than that, because it had acquired other shares over time from dividends in kind and from separate share purchases in the market.

30. At the same time, in the Autumn of 2016, it seems that an exercise was being conducted to consolidate the Wiese family shareholdings in Upington. Thus, Thibault came to transfer its shares in Steinhoff NV to Upington. This was achieved by means of a Dutch law governed "*Asset-for-Share Exchange Agreement*" dated 5 October 2016.

31. The upshot was that Thibault dropped out of the picture and, so far as relevant for present purposes, Upington became the sole security provider. Again according to Mr du Preez, Upington eventually came to pledge a total of 750m shares in Steinhoff NV to the Margin Lenders, including within that overall total the 314m it had acquired directly. For reasons which will appear below, it will be convenient to refer to the shares subject to these security arrangements as the "*Charged Shares*." This is the language of a series of English law governed security agreements (the "*2016 Security Agreements*") which formed part of the security agreed with the lenders under the 2016 Margin Loan.

32. Some time later, in June 2017, the 2016 Margin Loan and the 2016 Security Agreement were replaced by a new "*2017 Facility Agreement*" and new "*2017 Security Agreements.*" Like the 2016 Security Agreements, the 2017 Security Agreements were governed by English law. The "*Charged Shares*" under the 2016 Security Agreements became Charged Shares under the 2017 Security Agreements. The 2016 and 2017 Security Agreements are critical documents because it is by virtue of these agreements that Conservatorium asserts its entitlement to advance the Upington and Thibault Claims.

33. I will come back to that point, but to continue the chronology for now, following the announcements about possible accounting irregularities made in late 2017 and early 2018, there was a collapse in the Company's share price and consequently an Event of Default under the 2017 Facility Agreement. The lenders' security rights were exercised, and the Charged Shares were appropriated and sold. However, that still left a shortfall owing under the 2017 Facility Agreement of some €993m.

34. Now comes the issue. Conservatorium is not the only party which claims the entitlement to pursue the Thibault and Upington Claims. There are competing claimants. Thibault and Titan say that in fact *they* are the parties properly entitled to pursue the Thibault and Upington Claims, Titan's position being that Upington ceded

its rights to Titan in September 2018 before being dissolved. To put it another way, there is a contest over ownership of those claims.

35. In fact, it was Upington and Thibault who first took action. In April 2018 those parties started proceedings in South Africa seeking damages and other relief in connection with the Thibault and Upington Claims - i.e. damages arising from the acquisition of shares in SIHPL undertaken originally by Thibault in 2014 (those shares later having been exchanged for shares in Steinhoff NV), and separately, damages arising from the later acquisition of shares in Steinhoff NV by Upington in 2016. These South African proceedings are still ongoing.

36. After those proceedings were commenced, during 2019, Conservatorium came to acquire the interests of all but one of the Margin Lenders under the 2017 Facility Agreement, together with their rights under the 2017 Security Agreements. It presently holds 94% of the total rights and benefits under those agreements. Conservatorium's position in short is that the scope of security under those agreements included security over the causes of action comprising the Thibault and Upington Claims. Thus, it says it is now the true owner of those Claims (or of 94% of them), and is entitled to their fruits or proceeds.

37. Pausing there to elaborate a little on the nature of the contest between Thibault and Titan on the one hand, and Conservatorium on the other, critical as regards both the Thibault and Upington Claims is an issue of construction under the 2017 Security Agreements. I was shown one such Agreement as an example. Under the scheme of the Agreements, "*Charged Shares*", which I have already mentioned above, are treated as a form of "*Security Asset.*" The definition of "*Charged Shares*" includes the shares together with "*all Related Rights.*" "*Related Rights*" are then defined to include, "*(b) any moneys or proceeds paid or payable deriving from that Security Asset*", and "*(c) any rights, claims ... in relation to that Security Asset*" (emphasis added).

38. Thus, Conservatorium say that the security granted over the Charged Shares included the causes of action accrued on (i) the 2014 purchase by Thibault of SIHPL Shares by in 2014, (ii) the exchange of the SIHPL shares for Steinhoff NV shares as a result of the 2015 scheme of arrangement, and on (iii) the later 2016 purchase of Steinhoff NV shares by Upington. All such causes of action were "*rights, claims*" in relation to the Charged Shares within sub-clause (c) of the definition of "*Related Rights.*" The security also included the right to receive the proceeds of such causes of action (see sub-clause (b)), which makes obvious good sense because as the English law authorities demonstrate, although a debt and its proceeds are conceptually two separate assets, it is commercially artificial to separate them in terms of ownership: "*An assignment or charge of a receivable which does not carry with it the right to receipt has no value. It is worthless as a security*" (per Lord Millett in Agnew & Anor. v. Commissioners of the Inland Revenue [2001] UKPC 28, [2001] 2 AC 710, at [46]).

39. These points are disputed by Thibault and Titan, who contend that the security granted by the 2016 and 2017 Security Agreements was narrower in scope, and although it included rights deriving from the Charged Shares themselves (such as the right to claim unpaid dividends), it did not extend to include causes of action for misrepresentation and the like arising on the acquisition of those shares.

40. This argument is of course relevant both as regards the Thibault Claim and the Upington Claim, because it is by virtue of its security interest that Conservatorium claims its entitlement to sue. Further points arise, however, as regards the Thibault Claim. That is because the original acquisition of shares in SIHPL in 2014 was by Thibault. It was only later, after those shares had been exchanged for shares in Steinhoff NV as a result of the 2015 scheme, that they came to be transferred to Upington by means of the Dutch law Asset-for-Share Exchange Agreement (mentioned above at [30]). And it was only after that that a proportion of them came to be pledged as Charged Shares by Upington.

41. Here, Thibault and Titan rely on two points. The first is that there is some admitted uncertainty about which shares ultimately came to be pledged by Upington as Charged Shares. The second point is that whatever "*Related Rights*" the security over those Charged Shares included, it *cannot* have included rights which were not transferred by Thibault to Upington under the Asset-for-Share Exchange Agreement. Again, therefore, an issue of construction arises, this time governed by Dutch law. Thibault and Titan say that only rights attaching to the shares themselves were transferred to Upington, and not causes of action arising on their acquisition (or on the subsequent exchange). Conservatorium says the opposite, relying on Clause 4 of the Asset-for-Share Exchange Agreement. This is headed "*Ownership, Risk and Benefit*" and provides in the relevant part that "*[o]wnership of and all risk in and benefits attaching to [the shares to be transferred] shall pass to Upington.*" The contest between the parties focuses on the meaning and scope of this language.

42. To resume the narrative, Conservatorium having stepped into the shoes of the majority of the Margin Lenders lost no time in seeking to recover some value from the claims it considered itself to have acquired.

43. Although proceedings were already on foot in South Africa, Conservatorium initiated its own proceedings in the Netherlands. These started, on or about 23 July 2019, with an application for pre-judgment attachment in respect of the Upington Claim. On 24 July 2019, the Court granted relief in the form of an attachment of Titan's claims against Steinhoff NV in respect of the Upington Claim, in the amount of €438,569,706.95. Related to that pre-judgment attachment, Conservatorium then brought proceedings on the merits against certain Wiese entities, including Titan and Thibault, on 23 August 2019. Those proceedings have since become dormant, although the attachment remains in place.

44. Some time later, in January 2020, Conservatorium started a separate and more wide-ranging claim in the Netherlands, seeking relief against SIHPL and against Steinhoff NV in relation to both the Thibault Claim and the Upington Claim (and in relation to a further claim referred to as the "*Margin Lender Claim*", which we need not be concerned with).

45. Thus, there are concurrent proceedings on foot in both South Africa and in the Netherlands in relation to the Thibault Claim and the Upington Claim. In the South African proceedings Thibault and Titan are the claimants, and in the Dutch proceedings the claimant is Conservatorium.

46. To complicate matters further, Conservatorium then applied to be joined in the South African proceedings, and Titan and Thibault applied to be joined to the Dutch proceedings.

47. Following a hearing on 2 June 2020, the South African court granted Conservatorium's application for permission to intervene in a judgment issued on 3 September 2020. The South African Judge said at [102] of his Judgment: "*In my view, based on the undisputed and common cause facts the applicant clearly prima facie established that it has a real and substantial interest in the matter. The applicant has clearly established a legal interest or legal basis, based on this fact.*"

48. Then on 23 September 2020, the Dutch court permitted Titan and Thibault to intervene in the Dutch proceedings, noting the existence of "*divergent views as to who is entitled to the claims in respect of the two Upington claims*" (meaning the Thibault Claim and the Upington Claim).

49. The upshot is that there is presently engagement in two sets of proceedings in two different jurisdictions, not only on the substance of the Thibault Claim and the Upington Claim, but also on the question of who is entitled to pursue those Claims.

50. This complicated picture is only part of the wider story which forms the backdrop to the Steinhoff Global Settlement, which I will now turn to.

The Steinhoff Global Settlement

51. There have in fact been two sets of proposals for the Steinhoff Global Settlement, the first in an initial Term Sheet circulated by Steinhoff NV on 27 July 2020 (the "*First Term Sheet*"), and the second in an amended term sheet (the "*Second Term Sheet*") dated 9 October 2020.

52. I will first summarise some headline aspects of the current proposal set out in the Second Term Sheet (and now carried though into the draft section 155 Proposal recently submitted to the South African Court), and then turn more specifically to Conservatorium.

53. The settlement proposal makes a distinction between persons who acquired shares in the market ("*Market Purchase Claimants*"), and those who acquired shares directly via subscription or like arrangements ("*Contractual Claimants*"). The headline offer is to pay a total of €887m to claimants in both categories by way of full and final settlement of all litigation claims against either SIHPL or Steinhoff NV. The settlement amounts are to be paid without any admission of liability: see for example para. 1.28, para. 4.17 and para. 45 of the draft section 155 Proposal. Moreover, the intended releases are very broad: para. 16.7 of the draft Proposal for example explains that the payments to be made to the "*Contractual Claimants*" are intended to be "*in full and final settlement*" of "*any and all claims of the Contractual Claimants of whatsoever nature, and however and whenever arising, [and] whether related to or based upon the Events [as defined] or otherwise ...*."

54. Other proposals are made specifically as regards financial creditors. These include terms allowing for extensions of the maturity dates of the existing facilities to 30 June 2023 (and with a further six months beyond that available in certain circumstances), and also the grant of new security by Steinhoff NV in favour of the counterparties to the various CPUs, including the present Scheme Creditors who are counterparties to the SEAG CPU. At present the Scheme Creditors' claims under the SEAG CPU are unsecured, but under the Steinhoff Global Settlement if implemented, the Scheme

Creditors will come to benefit from what I will call the new "*Steinhoff NV Security.*" This is described in the Company's Skeleton Argument for the hearing before me as follows:

> *"(1) [The Steinhoff NV Security] is to comprise, with effect from the Settlement Effective Date, first ranking security granted by the Company over (i) its shares in SIHL, which is a holding company of the South African sub-group and (ii) any loan payable by SIHL to the Company and outstanding immediately following the Settlement Effective Date.*
>
> *(2) [The Steinhoff NV Security] will rank and secure the Company's obligations under the contingent payment undertakings executed by the Company (including the SEAG CPU) and the Company's obligations in respect of intragroup indebtedness pari passu and without any preference between them.*
>
> *(3) The security will be vested in a security agent on behalf of the secured creditors."*

55. I now come back to Conservatorium. Some brief history is necessary to understand its complaints.

56. Before the First Term Sheet, there had been correspondence between Conservatorium and Steinhoff NV's advisers, Linklaters LLP, about the treatment of the Thibault and Upington Claims. In a letter dated 24 June 2020, Linklaters LLP said the following in a passage in their letter addressing both the Thibault Claim and the Upington Claim:

> *" ... what the Steinhoff Parties propose to do is to implement any Global Settlement in the interests of all stakeholders, reserving from any associated distributions amounts in respect of claims the ownership of which is in dispute."*

57. They then referred to any reserve in relation to the Thibault Claim being maintained "*as part of* the *Section 155 process*" (a reference to the intended process in South Africa under the South African Companies Act), and to any reserve in relation to the Upington Claim being maintained "*as part of the SOP process*" (a reference to the likely Suspension of Payments procedure in the Netherlands), and continued:

> *"Insofar as ownership disputes continue to exist in relation to these claims in the meantime, this will mean that distributions in respect of these claims (c.f. voting on the compromise or plan itself) will be delayed pending the determination of those disputes."*

58. Then, in a separate paragraph dealing with the Upington Claim, Linklaters LLP said:

> *"Steinhoff plainly cannot make payment to a party in respect of an alleged claim, in circumstances where there remains live*

litigation as to whether or not that party is the owner of the claim."

59. At the heart of Conservatorium's assertion of unfairness is the submission that although the First Term Sheet in July 2020 recognised the principle set out in this last quotation, the later proposal in the Second Term Sheet of 9 October 2020 failed to do so, or more particularly, failed to do so as regards the Thibault Claim.

60. Both Term Sheets deal with the Thibault Claim in a section concerning SIHPL, and with the Upington Claim in a section concerning Steinhoff NV.

61. As regards the Thibault Claim, the proposal in the First Term Sheet was that SIHPL would recognise a contractual claim in respect of the shares issued to Thibault in 2014, but the Group would continue to dispute any other claims. As regards the contest over ownership, the Term Sheet said:

> *"SIHPL will consider paying any compensation attributable to a claim in which the ownership is disputed into escrow ...".*

62. As regards the Upington Claim, the First Term Sheet proposed a settlement amount of EUR 82m, but only "*following resolution of the dispute between Upington/Titan and Conservatorium.*"

63. In the Second Term Sheet, the proposal as regards the Upington Claim is the same, but as regards the Thibault Claim is different. The Thibault Claim is wrapped up with a number of other claims referred to collectively as the "*Titan Claims*", and the proposal is that:

> *" ... SIHPL will pay to the Titan entities the respective settlement amounts notwithstanding any continuing ownership dispute."*

64. According to the section 155 proposal provided to the South African Court at para. 4.27.2, a total of Rand 7.9bn is to be paid in respect of the "*Contractual Claims of Thibault and Wiesfam*", Wiesfam being another company associated with Dr Wiese. The Thibault "*Contractual Claim*" refers to Thibault's claim arising out of its acquisition of shares in SIHPL in 2014, and so corresponds (in large part at least) to what I have referred to as the Thibault Claim.

65. Thus, although only a composite figure is given, it seems that a substantial sum is to be paid over in respect of a claim which largely corresponds to the Thibault Claim: R7.9bn is roughly equivalent to £380m. That said, as Mr Al-Attar for the Company has pointed out, and as is explained in the section 155 proposal, this represents a proportionally lower recovery rate (18.7% of the collective claim amounts) than in respect of other contractual claims (where the rate is 29.3%).

66. Before moving on, I should flag one other part of the background relied on by Conservatorium.

67. As noted, the Second Term Sheet was circulated on 9 October 2020. As part of their challenge, Conservatorium drew attention to an email sent to Linklaters LLP two days earlier by Mr Tinus Slabber, who was instructed "*on behalf of Dr Christo Wiese and*

the Titan Group of Companies (which includes Thibault)". I should add that the email was copied to various other recipients, including Conservatorium's advisers, Quinn Emanuel. Mr Slabber referred to ongoing negotiations with a number of parties, and then said that although his clients had been *"prepared to accept benefits substantially less than that which will accrue in the event of a breakup/liquidation in an endeavour to effect a global settlement*", other parties had not been cooperative and so his clients now intended to "*pursue their claims to the best outcome.*" He then went on, however, to add the following:

> *"Notwithstanding and as a courtesy, Steinhoff is afforded until the 30th November 2020 (on condition of payment of an additional Euro 20m) to effect binding written settlements which will allow a global Steinhoff settlement to be implemented and these settlements must specifically include all matters involving Conservatorium, Thibault, Titan and Upington and the Wiese family and entities and will compel payment to my clients (whether in a s. 155 or otherwise) free of contesting, withholding and/or deduction. Failing same, my clients will not pursue the current proposal and will insist on their pro rata share in respect of all claims (it being accepted that SIHPL and NV will end up in liquidation, having to pay a pro rata distribution to concurrent creditors).*"

68. Conservatorium say the demand made by Mr Slabber ("*these settlements must ... compel payment to my clients ... free of contesting, withholding and/or deduction*") must be connected to the revised proposal in the Second Term Sheet concerning the Thibault Claim. In fact, they say, the revised proposal must be the Company giving in to Mr Slabber's demand, backed by his clients' threat that if their demand was not met they would not support the Steinhoff Global Settlement and would look to liquidation as an alternative. Thus, they say, the revised proposal is not based on any principled assessment of the relative merits of Conservatorium's claim to ownership versus Thibault's claim to ownership, but instead represents the Company responding in an unprincipled and cynical way to posturing by one of its major creditors.

Scheme Meetings

69. Coming back now to the present Scheme, I should say I have reviewed the Chairperson's report of the Scheme Meetings prepared by Mr James Douglas, a partner at Linklaters LLP. The meetings were held remotely, in accordance with the directions given by Sir Alastair Norris.

70. The short point is that the Scheme was unanimously approved by the Facility A1 Lenders and was approved by a majority in number of the Facility A2 Lenders representing over 92% in value of those present and voting. I am told that the two Facility A2 Lenders that voted against the Scheme (namely CSCP III Master Lux S.a.r.l. and CCP Credit Master Lux S.a.r.l.) are funds affiliated with Conservatorium.

71. As to turnout, 97% by value of the Facility A1 Lenders and 93% by value of the Facility A2 Lenders participated in the vote. All voted by proxy.

The Application for Sanction & the Objection

72. The relevant statutory provision is Companies Act 2006 section 899:

> *"(1) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (...) present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.*
>
> *(2) An application under this section may be made by - (a) the company ...*
>
> *(3) A compromise or arrangement sanctioned by the court is binding on – (a) all creditors or the class of creditors or on the members or a class of members..., and (b) the company."*

73. Both the Company and Conservatorium in their respective Skeleton Arguments referred me to the following passage in Re Telewest Communications (No. 2) Ltd [2005] 1 BCLC 772, in which David Richards J stated the relevant principles (at [20]-[22]):

> *"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.'*
>
> *This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under*

> *s 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.*
>
> *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'."*

74. The Company says that the Scheme should be sanctioned. Looking to the formulation above derived from Buckley on the Companies Acts, it says that the statutory requirements have all been complied with; that the relevant classes were duly represented and that the relevant majorities acted *bona fide* in the interests of their classes; and that the Scheme is such as an intelligent and honest man might reasonably approve – i.e., the Scheme is "*fair*".

75. Conservatorium, however, says there is a "*blot in the Scheme*." Accepting that it is not a Scheme Creditor, it nonetheless relies on Re BAT Industries (3 September 1998, unreported), a decision of Neuberger J. (as he then was), to say that it has a sufficient interest to give it standing to object. That is because the present Scheme is simply part of an overall effort to give effect to the Steinhoff Global Settlement, and its rights will be affected by that settlement. Moreover, it says its rights in relation to the Thibault Claim will be affected unfairly, since the current proposal is that Thibault will be treated as the owner of the Thibault Claim, whereas the question of ownership is in issue. It is unfair for the Company to have arrogated to itself the power to determine that question. A fair proposal, as the Company itself recognised originally, would be some structure which maintained the *status quo*, but the Company has abandoned that original stance not on any principled basis but in a cynical way designed to prefer the interests of Dr Wiese and his associates. Moreover, the Company has not given a clear account of all its exchanges with the Wiese interests, which would allow its *bona fides* to be properly tested. The Scheme should therefore not be sanctioned, and it is no answer to say that the Steinhoff Global Settlement will be subject to further review by the Dutch and South African Courts, since it is not clear what form those reviews will take and that they will provide sufficient protection for Conservatorium.

Discussion and Conclusions

Statutory Requirements and Other Matters

76. To begin with, I should say I am satisfied that the relevant statutory requirements have been complied with.

77. I have already noted above that the required statutory majorities were obtained. I am also satisfied that the meetings were summoned and conducted in accordance with the

Convening Order made by Sir Alastair Norris. I am also satisfied as to class-composition. Sir Alastair in his Judgment approved the Company's proposal that there be two classes of Scheme Creditor, on the basis that Facility A2 is subordinated to Facility A1, but that no further fracturing of those two classes was justified: here I adopt the reasoning of Sir Alastair at paragraphs [15]-[19] of his Judgment.

78. I am also satisfied as to the *bona fides* of the statutory majorities: the turnout was high, and the decisions they made seem entirely rational. I have seen nothing to suggest that the majorities were not acting in the interests of their respective classes.

79. I will come on below to address the third aspect of the analysis derived from Buckley (the perspective of the intelligent and honest scheme member), since that seems to me to be related to the question whether there is a "*blot in the scheme*." To deal with two other points at this stage, however, I should first mention the question of jurisdiction. As regards the Company, I am satisfied that although incorporated abroad, it has a sufficient connection with the jurisdiction for it to be wound up as an unregistered company under the Insolvency Act 1986: this conclusion is justified on the basis that the Facility A1 and A2 arrangements are governed by English law and the SEAG CPU is governed by English law: see Re Drax Holdings Ltd [2004] BCC 334, and Re Vietnam Shipbuilding Industry Group [2014] BCC 433, at [9]. As regards EU domiciled Scheme Creditors, I am satisfied, in accordance with the settled practice of assuming that the Recast Judgments Regulation (EU) No. 1215/2012 applies, that jurisdiction is established both under Article 25 (on the basis of the jurisdiction clauses contained in the SEAG CPU and the SEAG Intercreditor Agreement), and under Article 8 (on the basis that 10 Scheme Creditors are domiciled in England & Wales, and can act as anchor defendants in respect of the remainder).

80. The second point is the international effectiveness of the Scheme. The purpose of the Scheme, put shortly, is to confer authority under English law for the amendment of debt instruments which are already governed by English law. The conclusion that such amendments will be regarded as effective in jurisdictions outside England & Wales is consistent with the general approach in private international law, and as regards the Netherlands and South Africa specifically, the conclusion is supported by evidence served by the Company (there are expert opinions on South African law from Mr Michael Fitzgerald QC and Mr Roger Wakefield, and on Dutch law from Dr Dennis Faber). Taking these matters together, I am satisfied that the Scheme will be effective internationally.

Factors in Play

81. Under this heading, it is convenient to consider what seem to me to be a series of inter-related matters, all of which feed into the overall analysis of whether Conservatorium has standing, and whether the present Scheme is a fair one or whether it is tainted by a "*blot*" such that the Court should refuse sanction.

82. Having considered the factors in play in this section, I will then set out my overall conclusions in a separate section below.

The Scheme and the Steinhoff Group Settlement

83. I accept the proposition, advanced by Conservatorium, that the present Scheme must be regarded as connected with the proposed Steinhoff Global Settlement. That seems entirely obvious. As already explained above, the purpose of the Scheme is to permit amendments to be made to certain English law documents, which are necessary in order to allow the Steinhoff Global Settlement to be implemented. Mr du Preez for the Company put the matter as follows in his evidence:

> *"The Scheme ... is a vital 'stepping-stone' for the Scheme Company in its efforts to implement the Steinhoff Group Settlement. This is because the Scheme Company requires the consent of its financial creditors to proceed with such efforts. In other words, it is a key gating item, without the achievement of which there is no prospect of implementing the Steinhoff Group Settlement."*

84. I also have little doubt that the present Scheme Creditors will have assessed the appropriateness of the Scheme by reference to that overall objective. I have already mentioned (see [54] above) that at least one material benefit, namely the new security to be provided by the Company in respect of liabilities under the SEAG CPU, will become available only when the settlement overall becomes effective. Moreover, the Scheme Creditors were encouraged to take a holistic view. For example, in its Explanatory Statement circulated pursuant to the Convening Order, the Company said the following, in the context of describing the benefits of the Scheme:

> *"The Scheme Company believes that these factors will in combination operate to the benefit of the Scheme Creditors relative to a situation in which the Steinhoff Group Settlement fails. Specifically, the Scheme Company believes that a successfully completed settlement will bring substantial finality to the significant contingent litigation liabilities and related uncertainty to which the Group is currently subject and will remove the overhang of the legacy events from the Group and its underlying businesses for the benefit of the continuing creditors of the Scheme Company, including the Scheme Creditors."*

85. In other words, in deciding how to vote, the Scheme Creditors were invited to compare the benefits thought to flow from overall implementation of the Steinhoff Group Settlement with the consequences of there being no settlement. As to the latter point, the Company's position, as explained in the evidence of its CEO Mr du Preez, is that the no settlement scenario is likely to lead to liquidation. I will need to return to one point on this issue below, but I will say now that, having considered Mr du Preez's evidence, I am satisfied that that is an appropriate comparator. As the Company has indicated, if settlement is not achieved there is a material risk that adverse judgments may be obtained from the latter part of 2021 onwards, and that given that its debt presently matures at the end of 2021, the Company will not be in a position to satisfy such judgments or to refinance its present indebtedness. Any liquidation proceedings are likely to be very complex and to take years to resolve. Financial experts, Analysis Group, have conducted modelling on the likely outcome of a liquidation scenario, which shows predicted returns to creditors (including the present Scheme Creditors)

which are lower than expected returns if a settlement is achieved. This evidence has not been directly challenged, and it seems to me the Court is entitled to rely on it and to accept the Company's case that liquidation is a suitable comparator scenario.

The Scheme a Stepping Stone only

86. At the same time, however, and while acknowledging that the overall equation for the Scheme Creditors was between an overall settlement on the one hand, or no settlement and liquidation on the other, it seems to me important to acknowledge that achieving the hoped-for overall settlement is not a foregone conclusion, and is certainly not achieved by means of the present Scheme alone.

87. On the contrary, other, and significant steps, will be required in order for the Steinhoff Group Settlement to be successfully implemented. Mr du Preez's descriptions of the Scheme as a "*stepping stone*" and a "*key gating item*" were carefully phrased. The present Scheme is not the culmination of the intended settlement process, but only the beginning of it. It is the key that unlocks the door to allow the remainder of the process to unfold, including the further anticipated court approval processes in South Africa and the Netherlands. Those processes will involve seeking input and approvals from much wider constituencies of interested parties than the present process, including not only other financial creditors aside from the Scheme Creditors, but also the various parties whose disputes are intended to be compromised. The relevant Courts will need to determine whether to approve or not approve the Steinhoff Global Settlement having regard to those wider interests. One cannot be certain how all these further elements in the process will develop.

88. It follows, as it seems to me, that the question to be addressed by the Scheme Creditors was not so much about giving final approval for the Steinhoff Global Settlement, but about whether it was in their interests to allow the remainder of the process a chance to run its course, or whether it was better to stop it in its tracks.

89. This question of future uncertainty, even in the event of approval of the present Scheme by the Scheme Creditors, was addressed in the Judgment of Sir Alastair Norris at [25]. Sir Alastair was concerned with the question whether the future uncertainty, arising in particular from the need for further Court approval processes to be conducted in South Africa and the Netherlands, was such that there was no utility in convening the requested meetings of creditors. Sir Alastair considered that, despite the admitted uncertainty, the meetings should nonetheless continue. He said:

> *"The question has arisen in the context of whether the court should grant sanction where the scheme is a part of an overall restructuring which involves a CVA where the CVA is under challenge. The point was before Zacaroli J in Re New Look Financing plc, [2020] EWHC 2793 (Ch) and before me in Re PizzaExpress Financing 2 plc [2020] EWHC 2873 (Ch), both sanction hearings. Zacaroli J and I shared the view that the desirable position was to put the pieces of the jigsaw on the table and then to see whether in the events it was possible to slot them together. The test to apply is to assess whether acceptance of the CVA in that case or acceptance of the group settlement agreement in this case is a fanciful prospect. At this stage it is*

certainly not fanciful, and uncertainty is not an obstruction in the way of convening meetings."

90. The analogy of putting the pieces of the jigsaw on the table is an interesting and apposite one. It suggests that the better approach, in a case where a threshold or "*gating*" issue arises, will usually be to allow the step to be taken which at least allows an opportunity for the remaining pieces of the puzzle to be assembled, rather than shutting the gate and foreclosing the opportunity entirely.

Further proceedings

91. Before me, there was some debate as to precisely what is intended by the Company as regards further steps in South Africa and the Netherlands. Conservatorium described the Company's position as "*coy*", which seemed to be a reference in particular to the fact that it had made no final decision, as far as the Netherlands is concerned, as between the Suspension of Payments procedure and the WHOA procedure.

92. As I have mentioned, however, matters became much clearer as a result of the Company producing a copy of its draft section 155 proposal, as now submitted to the South African Court. It follows that the South African process has now started. We can assume it will continue. Moreover, again as already noted, the section 155 proposal is consistent with the idea that the Company's preferred method of approach in the Netherlands will be by way of the Suspension of Payments procedure, rather than the WHOA procedure, and indeed Mr Al-Attar told me that that was likely to be the case, although he did not feel able to say that a final decision had been made. Mr Al-Attar's indication is obviously consistent with the Company's apparent opposition to the WHOA procedure initiated by Conservatorium itself. In those circumstances, it seems to me that although there is obviously still uncertainty about the eventual outcomes of the two processes, the Court has a sufficiently clear picture of what the Company now intends should follow.

93. It is also relevant to note one further, and important aspect of the intended further processes. This concerns the ability of Conservatorium to participate in them. On this topic I have evidence from Mr du Preez, in his Second Witness Statement. He says the following at paragraph 50:

"(i) in the context of any of the implementation processes chosen by Steinhoff in the Netherlands (the "Dutch Implementation Process"), I understand that:

(a) as a non-acknowledged creditor whose alleged rights will be directly impacted by the Dutch Implementation Process, Conservatorium will be entitled to be heard by the Dutch court prior to any decision to confirm the Steinhoff Group Settlement;

(b) in particular, in either a Suspension of Payments Procedure ... or a ... WHOA ... procedure Conservatorium will be entitled (as of right) to be heard by the court (as to any issue going to voting entitlements) ahead of any confirmation hearings;

> *(c) Conservatorium will also be entitled (as of right) to be heard by the court at the confirmation hearing and would be allowed to rase any grounds it wishes with a view to persuading the court not to confirm the plan, unless implementation occurs by way of WHOA proceedings and it has by that stage been determined by the Dutch court that Conservatorium is not entitled to vote on the WHOA Composition Plan ...*
>
> *(ii) in the context of the Section 155 process in South Africa, I understand that:*
>
> *(a) as a creditor whose alleged rights will be directly impacted by the proposal, Conservatorium will be entitled to be heard by the South African court prior to any decision to sanction the proposal;*
>
> *(b) Conservatorium may seek to persuade the court that Steinhoff should not be permitted to implement the Steinhoff Group Settlement, on the basis that it is inconsistent with Conservatorium's (alleged) rights or otherwise unfair ... ".*

94. That evidence was not directly challenged, although for Conservatorium Mr Smith QC said that the position in relation to the South African section 155 process was unclear, insofar as in South Africa (as in this jurisdiction) there may be a question of standing. In response, Mr Al-Attar, on instructions, indicated that the Company would not take any point on Conservatorium's locus to object to the section 155 scheme as an alleged creditor, although not a Scheme Creditor.

Uncertainty as to Ownership of the Thibault Claim

95. Thus far, I have focused on one element of uncertainty in the overall mix, which is the question of uncertainty of outcome as regards the intended Dutch and South African approval processes. But there is another important element of uncertainty, which is the uncertainty as regards Conservatorium's entitlement to advance the Thibault Claim at all.

96. That entitlement is asserted, but not accepted by Thibault/Titan. Proceedings are pending in which the issue is engaged, but have not yet been resolved. In part the issue of entitlement to the Thibault Claim depends on construing the scope of the security granted pursuant to the 2016 and 2017 Security Agreements, which are governed by English law (do "*Related Rights*" include causes of action for misrepresentation and the like?) Neither side, however, has invited a determination of that question, and in fact Conservatorium's position is very emphatically that the "*pending dispute as to the ownership of the [Thibault] Claim] should not be determined by anyone other than by the Dutch or South African Courts.*" In any event, determining the English law question would not provide an answer because there is also the separate question of what rights were transferred under the Dutch law Asset-for-Share Exchange Agreement of October 2016.

97. As matters have developed, this ongoing uncertainty presents a problem for the Company in seeking to achieve an overall settlement of claims against the Steinhoff Group. What is now proposed as a response to this uncertainty, although at an earlier stage the proposal was a different one, is that the Company should proceed on the basis that Thibault/Titan are the correct claimants, not Conservatorium.

No Determination of the Ownership Question

98. Pausing there, I should say that on this point, I disagree with the characterisation in Conservatorium's Skeleton (para. 64) that the effect of the Company's proposal, if implemented, will be to "*determine*" the ownership contest between Thibault and Conservatorium. That is not correct. The Company is offering terms of a compromise. It is not determining anything, in the sense of purporting to make a binding adjudication. Nothing it does is intended to bind Conservatorium. It could not possibly do so. Instead, it has decided that it is content to put forward an offer on the basis that payment to Thibault/Titan will discharge the Thibault Claim. It will either be right or wrong about it, but if it is wrong, Conservatorium's rights – whether its security rights under the 2017 Security Agreements or otherwise – will not have been compromised or affected. The effect will be that the Company will have paid the wrong party, and there will have been no effective discharge of liability.

99. I therefore cannot accept the submission made (for example) at para. 57 of Conservatorium's Skeleton, to the effect that the proposal involves the Company "*purporting to determine a proprietary dispute between Conservatorium and Titan/Thibault*", or that at para. 62, to the effect that the Company is an inappropriate body to determine the ownership question. It would be, but that is not what it is proposing to do. Likewise, I cannot accept the overall summary at para. 49, namely that "*Conservatorium's rights will be directly and materially affected by the Steinhoff Group Settlement Proposal.*" That is too emphatic a statement given the current uncertainty. Conservatorium's rights *might* be affected, but for the moment it has not established that it has any.

100. To put it another way, it might well have been appropriate to describe the Steinhoff Global Settlement as unfair if it purported to operate in disregard of established legal rights, but it is not obviously unfair for the Company to put forward a proposal based on a particular assumption as to ownership, which is not binding as between the competing claimants, and which it accepts will not be binding on Conservatorium if it turns out to be wrong.

101. Thus, Conservatorium's complaint is really about the Company's failure to propose terms which maintain the *status quo*, as it did originally, but which it has now resiled from.

102. Again, however, given the uncertainty, I do not see this as infringing Conservatorium's rights. It does not have an established right to require the relevant settlement amounts to be paid into an escrow account. It would if it applied for, and obtained, interim relief, perhaps most appropriately in South Africa, but so far it has not done so, and if it were to make such an application (as Mr Al-Attar pointed out) it would likely have to be accompanied by a cross-undertaking in damages, to make good any losses accruing to other affected parties in the event it turned out the order was wrongly granted.

The Second Term Sheet

103. This uncertainty over ownership of the Thibault Claim forms part of the backdrop to the revised proposal in the Second Term Sheet. But there were other factors in the mix as well, which Mr du Preez in his Second Witness Statement describes as follows:

> *"As I explained at paragraph 128 of my First Witness Statement, having initially proposed that the proceeds of the Thibault Claim be paid into escrow, it became clear to Steinhoff that the Steinhoff Group Settlement would not stand a realistic prospect of success if it were proposed on that basis. Important considerations in this respect are that:*
>
> *i) the Thibault Claim is by far the largest claim in the SIHPL estate, comprising approximately 87% by value of the 'Contractual Claims' asserted against SIHPL (which comprise a separate class for the purposes of the proposed Section 155 compromise);*
>
> *ii) there is no basis therefore on which SIHPL's proposed Section 155 compromise, and therefore the Steinhoff Group Settlement as a whole, can succeed without voting support in respect of the Thibault Claim;*
>
> *iii) as Steinhoff has indicated to Conservatorium several times in correspondence (including by means of Linklaters letter dated 8 June 2020 [...]) , although it will ultimately be a matter for the chairperson of the relevant Section 155 meeting, Steinhoff's clear view, for all of the reasons set out above and in correspondence, is that a properly advised chairperson would admit Thibault rather than Conservatorium to vote in respect of the Thibault Claim;*
>
> *(iv) for reasons explained below, Steinhoff (as well as other key creditors of the Scheme Company and SIHPL) have very material doubts as to whether Thibault would vote in favour of a Section 155 compromise that did not provide for the proceeds of the Thibault Claim to be paid to it or its nominee; and*
>
> *v) if Thibault did not vote in favour, SIHPL's proposed Section 155 compromise, and therefore the Steinhoff Group Settlement as a whole, would fail to the detriment of the Scheme Company, SIHPL and their respective creditors and contingent creditors (including the Scheme Creditors and Conservatorium)."*

104. On the question of the relative merits of the competing claims to ownership of the Thibault Claim, Mr du Preez had earlier said the following at para. 91 of his First Witness Statement (emphasis added):

> *"It is important to make clear that Steinhoff's reformulation of the proposal in this respect is wholly consistent with its*

understanding of the legal position. Having carefully considered the evidence put forward to date by each of the relevant parties, Steinhoff's assessment of the matter is that there is no credible basis for Conservatorium's contention that the Thibault Claim transferred to Upington pursuant to the Exchange Agreement and that Upington never otherwise became entitled to assert it or any equivalent claim. Steinhoff takes that view, among other things, on the basis of: (i) a plain reading of the Exchange Agreement, which contains no express language purporting to transfer claims in the nature of the Thibault Claim; and (ii) the absence of any evidence to suggest that the Exchange Agreement should for these purposes be read otherwise than in accordance with its plain language."

105. Conservatorium invite me to characterise the Company's action in reformulating the proposal in the First Term Sheet as the Company cynically caving in, on an unprincipled basis, to the demands of a major creditor.

106. I do not agree with that characterisation of the evidence. Approaching the question broadly, it seems to me more natural to characterise the revised terms as an attempt by the Company to balance a number of competing factors. One is the uncertainty over ownership of the Thibault Claim; another is the importance to the Group of the Steinhoff Group Settlement being achieved; another is the relative importance of the Thibault Claim given its size; another is the urgency which arises from the need to extend the current maturity dates for the Group's indebtedness beyond the end of 2021; and yet another is the Company's own advice, and assessment, of the relative merits of Thibault's claimed entitlement to ownership versus Conservatorium's claimed right. Balancing those factors together, the Company has formed the view that the revised proposal in the Second Term Sheet gives it the best chance of securing approval for the Steinhoff Global Settlement. I do not see that as involving unprincipled favouritism. Rather, it is the acceptance of a hard commercial reality, arrived at after a lengthy period of negotiation in an environment which is no doubt highly demanding, and in which different parties have entirely polarised views as to what outcome they would prefer.

107. Having set out that conclusion, I should deal briefly with two particular points made by Conservatorium. The first is an assertion that the duty of full and frank disclosure (see per Snowden J. in Re Indah Kiat International Finance Co. [2016] BCC 418 at [40]), which the Company accepts it is subject to, extended as far as requiring "*a full and frank account*" of the dealings with "*Dr Wiese, the Wiese entities and their representatives ... including copies of relevant communications.*" Conservatorium says this is required in particular because of Mr Slabber's email of 7 October (above at [67]), the timing of which gives rise to the inference that in publishing the Second Term Sheet on 9 October, the Company was cynically doing just what Dr Wiese and his associates wanted. Conservatorium say that that point needs to be fully ventilated and investigated, and the Company should have given a full account of it.

108. I do not accept that submission. The duty of full and frank disclosure is a vital one, and is no doubt fact specific as Mr Smith QC pointed out, but I cannot agree that in the present context, it requires a detailed account to be given, together with production of relevant copy documents, of the course of negotiations with one of the affected parties. For one thing, whatever the background, the end point of the Company's deliberations

and negotiations with the Wiese parties is clear: it has made its proposal, which can be assessed on its own terms. For another, Mr du Preez has already set out in his evidence an entirely credible explanation of the Company's motivation, which he candidly accepts involves a calculation of what is mostly likely to result in overall approval of the Steinhoff Global Settlement. It seems to me going much too far in those circumstances to think that the role of the Court is to conduct an interrogation of the precise decision-making processes which led to the formulation of the revised proposal, so as (for example) to assess the weight given to the content of Mr Slabber's email of 7 October. That seems to me an irrelevance for present purposes, and not the function of the Court on an application of this kind.

109. The second point to mention is the reference in Mr du Preez's First Witness Statement to the Company viewing Conservatorium's claim to ownership as having "*no credible basis*." It is said that that cannot be true, in particular in light of the decision of the South African Court to permit Conservatorium to intervene in the proceedings begun by Thibault. That being so, Conservatorium say that the reference to "*no credible basis*" is a smokescreen to disguise the Company's real motivation, which is to prefer the interests of Dr Wiese and his associates.

110. This point prompted some detailed discussion before me as to what the South African Judge decided, in determining that Conservatorium had demonstrated a "*prima facie*" case for intervention. It seems to me, however, that that is something of a sterile debate. I am willing to accept that the South African Judge must be taken to have determined that the issue of ownership was a triable issue, and that on the face of it, that is inconsistent with the idea that there is "*no credible basis*" for Conservatorium's claimed entitlement. But I do not think I can infer from that that Mr du Preez's statement of *the Company's* view is inaccurate. After all, it is entitled to take its own advice and form its own view, and I have seen nothing to suggest that Mr du Preez's evidence is anything other than a truthful account of what that view is.

111. Further and in any event, the key point is perhaps not so much whether the Company's emphatic assessment of the Conservatorium claim is accurate, but instead whether there are features particular to the Thibault Claim which justify a different approach to that taken in relation to the Upington Claim and indeed others where ownership is disputed. Again, I have not been invited by either party to express a final view, and must be careful not to do so given the pending proceedings elsewhere, but it seems to me there are some points of distinction which rationally might justify a different approach.

112. As to this, unlike the shares subject to the Upington Claim which were acquired directly, the shares said to be the subject of the Thibault Claim had a more complicated history (see above at [26]-[29]). This makes it difficult to identify the precise number of shares, within the 750m eventually designated as Charged Shares by Upington, which can be traced back to the original acquisition by Thibault in 2014. Conservatorium says this does not matter, because Thibault and Titan accept that at least *some* shares can be traced back, and that is a factual matter which can be resolved in due course. To be fair to the Company, however, I think its point goes further than that, and is not just about identifying a precise number of shares. It also says that, given the difficulties inherent in tracing through a series of larger, fungible holdings the precise shares derived from an original acquisition made some years before, it is unlikely it was intended to grant a security interest over causes of action which accrued on that acquisition, or indeed to transfer them via the Dutch law Asset-for-Share Exchange Agreement. Again, I offer

no comment on these arguments beyond saying that they appear to me to be a rational point of distinction between the Thibault Claim and the Upington Claim, which might be said to justify a different settlement approach.

Conclusions

113. Against the background of those various factors, I come to set out my conclusions.

Standing

114. I should first address the issue of Conservatorium's standing to advance an objection to the Scheme. The Company asserted that Conservatorium had no standing, since it is not a Scheme Creditor, is not affected by the Scheme, and will have the opportunity in other fora (i.e., in South Africa or the Netherlands) to make its objection – and indeed those other fora (borrowing the language of *forum non conveniens*) are clearly and obviously more appropriate fora for the ventilation of its concerns.

115. The authorities establish, however, that the discretion of the Court to take into account the interests of third party objectors is a wide one, and has to be exercised in a commercially realistic manner – i.e., taking into account the broader context in which the Scheme is intended to operate.

116. Both parties referred me to In re BAT Industries plc (unreported, 3 September 1998), a decision of Neuberger J. The scheme there was a members' scheme of arrangement, involving a proposed reorganisation of the ownership of BAT Industries. Separate from the scheme, but still part of the same overall arrangement if the scheme became effective, BAT Industries proposed to declare a dividend *in specie* of certain of its investments. At the sanction hearing, objectors who were pursuing litigation claims against BAT industries in the United States sought to say that they would be prejudiced by the declaration of such a dividend, which was likely to have an impact on their ability to enforce their claims if eventually made out.

117. Neuberger J considered that the objectors had standing before him, but still sanctioned the scheme. On the issue of standing, he said the following, emphasising the broad discretion the Court has:

> *"There is nothing in s.425(2) which indicates that the power of the court is to be fettered as to whom it can hear and what it must take into account. Given that the circumstances in which a company and its members may wish to come up with a scheme are multifarious, it seems to me scarcely surprising that the legislature did not consider it appropriate to lay down any limitations as to the procedure which the court should adopt or the factors it should take into account, when considering whether to sanction a scheme"*

118. Neuberger J also considered the closely related issue that the objection made was not to the scheme as such, but instead to the dividend in specie which was intended to follow. His approach was that the Court should be realistic (emphasis added in the text below):

> *"To my mind the fact that the objectors object to a consequence of the scheme does not prevent them from being heard and does not, at any rate without more, prevent them from having their interests taken into account. First, it appears to me that in light of the way in which s.425(2) is framed, and indeed as discussed in the passage which I have cited from Buckley, there is no reason why the court should be required take such a blinkered, narrow and uncommercial approach as to ignore the fact that the scheme which is sought to be sanctioned is the first and necessary stage of a larger process...*
>
> *However, if it is permissible in an appropriate case to take into account third party concerns when considering whether to sanction a scheme, it seems to me unduly artificial if one can take them into account if they are affected by the scheme itself but not if they are affected by a subsequent step which is clearly dependent on, and consequent on, the sanctioning and implementation of, the scheme.*
>
> *...when a court is asked to sanction the scheme, it is right, as in this case, for the court to be told, and to take into account, the whole context of the scheme including the process of which the scheme forms part. That must be right: the court can scarcely be expected to sanction the scheme unless it appreciates its full commercial and factual context. If that is correct then it seems to me to follow that one can take into account subsequent steps also for the purpose of considering third party objections. Accordingly, it does appear to me that, as a matter of principle, the court can take into account the concerns of the objectors even though they are not the company, or members of the company, and one can take them into account even though their concerns arise not from the scheme itself but from a step which will inevitably follow if and when the scheme is implemented."*

119. Applying that approach here, I have reached the conclusion that Conservatorium should be allowed standing, by which I mean it should be afforded the ability to state its objections and have them taken into account by the Court in its overall assessment of whether to sanction the Scheme.

120. I reach that conclusion on the basis that although it is a third party, and not a Scheme Creditor, Conservatorium has a sufficient interest in the wider restructuring of which the present Scheme forms part to justify its views at least being heard and taken into account. The present Scheme cannot be viewed in isolation; it would be uncommercial and artificial to do so. A fair assessment requires one also to look ahead to the intended Steinhoff Global Settlement. Conservatorium has an interest in the Steinhoff Global Settlement because it has at least the *potential* to affect its rights (i.e. if the assumption the Company and SIHPL intend to make, namely that Conservatorium is not the true owner of the Thibault Claim, turns out to be wrong).

121. I think that conclusion is consistent with the somewhat protean nature of the word "*blot*", which as Vos J (as he then was) said in Re Halcrow Holdings Limited [2011]

EWHC 2662 at [47] " ... *has the benefit of a lengthy history but it has no inherent meaning in this context.*" I accept Mr Smith QC's submission that the concept of a "blot" enables the Court to take into account, where appropriate, a potentially wide range of factors when considering whether to sanction a scheme, including "*the full commercial and factual context of the scheme, including any consequences of it*": Palmer's Company Law at 12.070. As Mr Smith also pointed out, there is no statutory guidance on the criteria for judging the fairness of a scheme of arrangement, and "*it is deliberately a broad test to be applied on a case-by-case basis*": Re T&N Ltd [2005] 2 BCLC 488 per David Richards J at [81].

122. I do not find persuasive the Company's argument based on an analogy with the *forum non conveniens* cases – that is to say, the argument that Conservatorium should be denied standing in this jurisdiction because it will have the opportunity of making its case in either South Africa or the Netherlands.

123. I do not find the *forum non conveniens* analogy an apt one. Where a case is stayed on *forum non conveniens* grounds, the Court declines jurisdiction and the entire matter is referred on to another Court for determination. But there is no question of declining jurisdiction here. For one thing, I was not asked to by the Company: it positively wishes its application for sanction to proceed. For another, as David Richards J pointed out in Re T & N [2005] 2 BCLC 488 at [122], the jurisdiction under the statute is not one which the Court has power to decline:

> "*The English Courts...remain bound by statute to give their own consideration to the fairness of the CVAs or schemes of arrangement, and notwithstanding the strong cross-border element and the desirability of concerted action, have no right or power to cede or qualify that jurisdiction*"

124. It seems to me that if the Court forms the view, as I have, that the objector has raised issues which arguably have a bearing on the question of the fairness of the scheme before it, the Court should consider those issues in determining whether to sanction the scheme or not. It cannot decline to take them into account on the basis that they are better raised elsewhere. If arguably relevant to the fairness analysis, then they should at least be evaluated. The Court cannot decline to deal with one part of the overall inquiry it is bound to undertake.

125. What it can do, however, is to take account of the likely further steps involved in the related restructuring in determining the fairness of the particular scheme before it, at the point in time at which sanction is sought. I will come back to this point below.

126. Before leaving the question of standing, I should indicate that nothing I have said above is intended to cut across the injunction contained in Neuberger J's judgment in BAT Industries, to the effect the court should not be assumed to have some sort of "*roving commission*" in scheme cases at the suit of any objector who claims some sort of prejudice. The broad discretion must be kept in bounds: see also the recent comments of Trower J. in Re Swissport Fuelling Ltd [2020] EWHC 3414 (Ch), at [34]-[46]. My conclusion is only that, on the particular facts of this case, it is right as a matter of discretion to afford Conservatorium standing and to take account of its objection in determining whether to sanction the present Scheme.

Fairness/Blot in the Scheme

127. In my judgment the Scheme is a fair one and there is no "*blot in the scheme*" which should prevent an order sanctioning it.

128. Taking first the perspective of the "*intelligent and honest man, a member of the class concerned and acting in respect of his interest*", I am entirely satisfied that the Scheme is a fair one when viewed through that lens.

129. The Scheme has the limited effect of authorising amendments to certain finance documents, but forming part of the much larger, anticipated restructuring comprised in the Steinhoff Global Settlement. The outcome of that overall process is uncertain, but what *is* certain is that it cannot happen without the relevant amendments coming into effect.

130. The contractual consent process having failed (narrowly) to secure the requisite majorities, the Scheme is proposed as the only effective alternative method of allowing the overall process to continue.

131. From the perspective of the two classes of Scheme Creditor, it is plainly desirable that it should.

132. Approval of the Scheme at least allows efforts to be made to bring the Steinhoff Global Settlement to fruition, with the benefits to the Scheme Creditors which will accrue if that is to happen, including not only the certainty which will flow from a cessation of the litigation hostilities affecting the Group, but also such matters as the grant of new security by the Company in respect of liabilities under the SEAG CPU (see above at [55]).

133. If the Scheme is not approved, however, then the efforts to achieve the Steinhoff Global Settlement cannot proceed and the opportunity to bring it to fruition will be lost. The alternative presented is continuing uncertainty and the likely liquidation of the Group.

134. I should say on this point that Mr Smith QC for Conservatorium challenged the proposition that the alternative to approval of the present Scheme was insolvency. He suggested that in the real world that would not happen, and that more realistically there would have to be a renegotiation.

135. I do not think I should proceed on that basis. Mr Smith's proposition is not supported by the evidence. The evidence is that there has already been a concerted effort at negotiation with multiple parties over a lengthy period, and that patience is beginning to run out (see, for example, Mr Slabber's email at [67] above). In any event I did not understand Mr Smith's submission to be made on the basis of any evidence, but rather based on general experience of how complex commercial negotiations tend to be conducted. It is no doubt correct that such negotiations involve a degree of brinksmanship. I do not however think it right for me to formulate an assessment of the possible counterfactual to approval of the Scheme based on a general feeling about how commercial negotiations are sometimes (or perhaps even often) conducted. That seems to me to be straying into just the sort of commercial evaluation which the Courts should shy away from. I refer again to the indication given by David Richards J., at the end of the passage quoted above from In Re Telewest Communications (No. 2) Ltd

[2005] 1 BCLC 772: " *... 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'.*"

136. I turn then to the question whether there is a "*blot in the scheme*" such that it should not be sanctioned. I think not.

137. In summary, my reason is that as matters stand before me, the asserted unfairness is too remote and inchoate to operate as a basis for my declining to sanction the present Scheme.

138. I have already rejected above (see at [98]-[102]) Conservatorium's submission that the current iteration of the Steinhoff Global Settlement involves the Company making any determination of Conservatorium's rights. That is incorrect in my view. Instead, the current proposal is a response to an ongoing state of uncertainty as to the existence of those rights, and represents (see at [106]) an attempt to balance that uncertainty with a range of other factors relevant to the Group's position.

139. In any event, more critical is the fact that there is uncertainty also as to whether the Steinhoff Group Settlement will come into effect in its current form. It may do – Sir Alastair Norris thought it at least not fanciful to assume it would – but that is not a foregone conclusion, and importantly Conservatorium will be afforded an opportunity to submit that it should not, and should either be abandoned or amended (see above at [93]-[94]).

140. I see no unfairness, and nothing which can properly be described as a "*blot*", which follows from sanctioning the present Scheme in a manner which allows the anticipated further steps in the process to unfold. There is no unfairness because, even acknowledging Conservatorium's interest in arguing for the desirability of an escrow or similar arrangement, the remainder of the process will give it the opportunity to raise that point and to invite the Dutch or South African courts to take it into account. Conservatorium will not be foreclosed from taking whatever action it likes. Moreover, the approval processes to be pursued in the Dutch and South African Courts will allow for a better overall assessment to be made than is possible in this Court. That is because evaluating Conservatorium's position reliably will require it to be considered in light of the Steinhoff Global Settlement as a whole, and that analysis, in turn, is likely to be greatly assisted by an understanding of the positions of the other stakeholders affected by it – i.e., the other financial creditors beyond the present Scheme Creditors, and the other litigation claimants – none of whom are before the Court in this jurisdiction given the limited scope of the amendments sought to be brought into effect by means of the present Scheme.

141. I should again emphasise that in stating my conclusion in that way, I am not purporting to exercise some discretion analogous to the *forum non conveniens* discretion. It is not a question of declining jurisdiction in favour of some other Court which is thought more appropriate to decide the question which arises. Rather, it is a question of assessing the issue of "*blot*" or fairness in a realistic way, which takes account of the fact that the present Scheme is only a limited part of a much broader overall picture, key aspects of which are yet to unfold. Conservatorium in its submissions emphasised the interconnectedness of the present Scheme with the Steinhoff Global Settlement, but I think then attached too little weight, in its argument on fairness, to the opportunities

afforded by that wider process to try to make good its objection. There is little doubt that Conservatorium is well resourced and it has shown no lack of creativity in the steps it has taken so far to try and protect its position; it seems entirely reasonable to suppose that it will seek to avail itself of the opportunities which the ongoing process will create. Given the nature of its objection, no unfairness arises from saying that that is what it should do.

142. The alternative, of course, would be for this Court to decline to sanction the present Scheme. But I fear such a crude response *would* have the potential for unfairness, because it would effectively foreclose any further efforts to implement the Steinhoff Global Settlement, and that might be unfair to the other stakeholders in the process (already mentioned above) who are not involved in the present application. Much better, it seems to me, to follow the guidance of Zacaroli J in Re New Look Financing plc, [2020] EWHC 2793 (Ch), and of Sir Alastair Norris in Re PizzaExpress Financing 2 plc [2020] EWHC 2873 (Ch), and to put this particular piece of the jigsaw puzzle on the table. Time will tell whether it is possible to slot all the remaining pieces together.

Overall Conclusion

143. In summary, I propose to sanction the Scheme. I will need to hear separately from counsel in relation to the proposed form of Order.

STEINHOFF INVESTMENT HOLDINGS LIMITED - STEINHOFF GLOBAL SETTLEMENT – AGREEMENT WITH DELOITTE AND CONSERVATORIUM

15 February 2021 7:05

"JE11"

Steinhoff Global Settlement - Agreement With Deloitte And Conservatorium

Steinhoff International Holdings N.V.
(Incorporated in the Netherlands)
(Registration number: 63570173)
Share Code: SNH
ISIN: NL0011375019

Steinhoff Investment Holdings Limited
(Incorporated in the Republic of South Africa)
(Registration number: 1954/001893/06)
JSE Code: SHFF
ISIN: ZAE000068367

STEINHOFF GLOBAL SETTLEMENT – AGREEMENT WITH DELOITTE AND CONSERVATORIUM

Steinhoff International Holdings N.V. ("SIHNV" or the "Company", together with its subsidiaries, "Steinhoff" or the "Steinhoff Group") announces the following update on implementation of its proposal to resolve the various multi-jurisdictional legacy litigation and claims against the Steinhoff Group, including those against former South African holding company Steinhoff International Holdings Proprietary Limited ("SIHPL").

Conservatorium

SIHNV previously announced that a hearing, scheduled for 8 February 2021 in the Amsterdam District Court following a request by Conservatorium Holdings LLC ("Conservatorium") to appoint a restructuring expert to SIHNV pursuant to Article 371 of the Dutch Bankruptcy Act (enacting elements of the recently enacted pre-insolvency proceedings, Wet Homologatie Onderhands Akkoord ter voorkoming van faillissement)("Application"), had been postponed until 15 February 2021. SIHNV also informed the market that it intended to challenge that Application.

Following a number of constructive engagements between the parties an agreement has been reached, in principle, between, among others, SIHNV, SIHPL, Conservatorium and certain entities linked to Christo Wiese. This agreement is subject to a number of conditions. The result of agreement reached among the parties is that Conservatorium will withdraw the Application.

Deloitte supports Steinhoff Global Settlement

SIHNV also announces that together with SIHPL it has reached an agreement with Deloitte Accountants B.V. and Deloitte & Touche South Africa (together: "Deloitte") pursuant to which Deloitte will support the proposed Steinhoff global settlement proposal announced on 27 July 2020. This means that Deloitte will make additional compensation available to certain Steinhoff claimants, including the market purchase claimants (the "MPC Claimants") in exchange for certain waivers and releases, provided that Steinhoff successfully completes the contemplated Dutch "suspension of payments" (the "Dutch SoP") and the statutory compromise process under South African law ("S155 Scheme"). Deloitte is still in discussions with certain representatives of the MPC Claimants on the details of this offer, which envisages that such claimant representatives will be entitled to receive a certain incremental cost compensation. A settlement between Deloitte and the Dutch Vereniging van Effectenbezitters ("VEB") was previously announced in October 2020.

Deloitte does not in any way admit liability for the losses incurred by Steinhoff and its stakeholders as a result of the accounting irregularities at Steinhoff.

Provided that Steinhoff successfully completes the contemplated Dutch SoP and the S155 Scheme and certain other conditions are fulfilled, Deloitte has agreed to offer an amount of up to EUR 55.34 million for distribution to MPC Claimants in exchange for certain waivers and releases (the "Deloitte MPC Settlement Fund"). Steinhoff and Deloitte have agreed that MPC Claimants or their representatives who in due course wish to apply to receive a part of the Deloitte MPC Settlement Fund must use the same claim form as the form which they in due course shall use for submitting their claims in the Dutch SoP and the S155 Scheme. In that form, MPC Claimants or their representatives who in due course wish to apply to receive a part of the Deloitte MPC Settlement Fund must (i) expressly state this wish in the to be published claim form by ticking the relevant box and (ii) must expressly provide the waivers and releases for

the benefit of Deloitte relating to the 'Events' and the 'Allegations' as set out in the form. If one or both of these boxes has not been ticked in the claim form, the applicant is not entitled to receive any distribution from the Deloitte MPC Settlement Fund. In due course, further information and claim forms will be published on www.steinhoffsettlement.com .

In addition to the offer to the MPC Claimants above, provided that Steinhoff successfully completes the Dutch SoP and the South African S155 Scheme and certain other conditions are met, Deloitte has further agreed to offer an amount of EUR 15 million for distribution to certain contractual claimants. Eligible contractual claimants will receive individual notice from Steinhoff on the manner in which they can apply to receive a share of the offered amount.

Further Information

The Steinhoff Group will provide updates in respect of implementation of the global settlement in due course.

Claimants will be able to review additional information and, in due course, submit their claim details on the following website: www.SteinhoffSettlement.com.

The Company has a primary listing on the Frankfurt Stock Exchange and a secondary listing on the JSE Limited.

JSE Sponsor: PSG Capital

Stellenbosch, South Africa

14 February 2021

Date: 15-02-2021 07:05:00

"JE12"

2.63 **"Newco 2A Loan"** – the loan note to be issued by SIHPL to Newco 2A in consideration for SIHPL's acquisition of the Titan Loan from Newco 2A on the following terms (*inter alia*) –

2.63.1 zero coupon;

2.63.2 repayment date being the final maturity date of 6 months after the Titan Loan final maturity date;

2.63.3 quarterly cash sweep at SIHPL and across the South African Sub-Group of the Steinhoff Group;

2.63.4 first ranking over SIHPL's assets, subjects to arrangements in respect of Non-Qualifying Claims being finally determined or agreed by SIHPL; and

2.63.5 limited recourse to the available assets of SIHPL and a solvent winding up of SIHPL;

2.64 **"Non-Qualifying Claimant"** – the holder of a Non-Qualifying Claim, and **"Non-Qualifying Claimant"** shall be a reference to any one of them as the context may require;

2.65 **"Non-Qualifying Claims"** – collectively all claims asserted against SIHPL (whether known to SIHPL or not) as at the Proposal Date and which are not subject to this Proposal, including, but not limited to, the following –

2.65.1 any and all claims made by Peter Andrew Berry, Andre Frederick Botha, Francois Johan Malan, Michael John Morris, Paul Ronald Potter and Warren Wendell Steyn in respect of shares in Business Venture Investments issued to them;

2.65.2 any and all claims made by Conservatorium in respect or arising out of margin loans extended to, and/or security granted in support of such loans by, Upington in 2016 and 2017;

2.65.3 any and all claims made by the South African Competition Commission in respect of alleged price fixing; and

2.65.4 claim asserted, or to be asserted in the future, by any person or entity whose claim does not fall under the definition of Contractual Claimants, SIHPL Market Purchase Claimants or Financial Creditors,

and "**Non-Qualifying Claim**" shall be a reference to any one of them as the context may require;

2.66 "**Online Claim Form**" – the claim form to be submitted by SIHPL Market Purchase Claimants pursuant to clause 22.3.2, and as made available on www.SteinhoffSettlement.com from time to time;

2.67 "**PPH**" – Pepkor Holdings Limited, registration number 2017/221869/06, a company registered and incorporated in accordance with the laws of South Africa, having its registered address at 36 Stellenberg Road, Parow Industria, 7293, Cape Town, Western Cape;

2.68 "**PPH Shares**" – the approximately 2,480 million shares in the capital of PPH held by Ainsley as at 15 January 2021;

2.69 "**Proposal**" - this document, being a proposal prepared and envisaged in terms of section 155 of the Companies Act, together with its annexures, including the addendum contemplated in clauses 30 and 34 above;

2.70 "**Proposal Date**" – the date on which this SIHPL Proposal is signed by a duly authorised member of the Board;

2.71 "**Proposal Effective Date**" – shall have the meaning ascribed thereto in clause 1.27;

2.72 "**Recorded Creditors**" – shall have the meaning ascribed thereto in clause 4.14;

4.7.3 obtain and implement a binding settlement of Litigation claims of SIHPL Market Purchase Claimants in consideration of SIHNV procuring payments on its behalf of settlement consideration in the form of cash and/or PPH Shares;

4.7.4 permit certain transactions in connection with such arrangements; and

4.7.5 further stabilise the Steinhoff Group so as to maximise what is available to be distributed in terms of this Proposal, by marshalling cash, preserving the going concern value of the Steinhoff Group's businesses and avoiding further litigation costs,

all for the purpose of enabling SIHPL to avoid insolvent liquidation and to provide a fair distribution of value to claimants. More broadly, the Steinhoff Group Settlement of which this Proposal forms part seeks to ensure the continuity of the Steinhoff Group's operations in order to safeguard the jobs of the thousands of employees of the Steinhoff Group's underlying businesses and, by preserving the value of those underlying businesses, to protect the broader universe of Steinhoff Group stakeholders.

Scope of this Proposal

4.8 This Proposal seeks to compromise (i) financial obligations which SIHPL admits that it owes to certain of its creditors, namely the Financial Creditors, and (ii) alleged (but disputed and not legally established) obligations that are alleged (but not admitted by SIHPL) to be owed by it to two distinct groups of its Litigation claimants, being the Contractual Claimants and the SIHPL Market Purchase Claimants. The Financial Creditors, Contractual Claimants and SIHPL Market Purchase Claimants are defined in Annexure A to this Proposal (i) collectively as the Scheme Creditors and (ii) respectively as the Classes of Scheme Creditors.

4.9 In summary:

4.9.1 Financial Creditors have undisputed contractual claims against SIHPL under the SIHPL CPU, a debt instrument. Both the fact and amount of SIHPL's liability in that respect are certain;

4.9.2 a Contractual Claimant is a Litigation claimant, which instituted claims against SIHPL prior to 05 December 2020, in respect of arms-length negotiated contractual arrangements under which shares in other enterprises were sold or transferred by such claimants or their related parties to SIHPL, and received consideration directly from SIHPL by way of issuance, or transfer, of SIHPL Shares. The fact and amount of SIHPL's liability in respect of such claims are uncertain but, for the reasons described in this Proposal, SIHPL is of the view that there is a potential that adverse judgments may be granted against SIHPL by a court of first instance; and

4.9.3 a SIHPL Market Purchase Claimant is an actual or potential Litigation claimant who otherwise 'purchased' (within the meaning ascribed to the term in the Steinhoff Allocation Plan) SIHPL Shares prior to close of business on 06 December 2015 and continued to hold SIHNV Shares it then received in exchange for such SIHPL Shares pursuant to the Scheme of Arrangement at close of business on 05 December 2017. The fact and amount of SIHPL's liability in respect of such claims are also uncertain but, for the reasons described in this Proposal, SIHPL considers that they give rise to a much less material risk of liability for it.

4.10 This Proposal is made **only** to these aforesaid Classes of Scheme Creditors. In light of the differences set out above, SIHPL has formulated a Proposal entailing differing settlement and compromise terms for each of its Classes of Scheme Creditors. Such differences are explained in further detail in this Proposal: see in particular clause 6.

4.11 This Proposal is not made to any person (including those who have already instituted Litigation proceedings against SIHPL) who does not qualify as a Financial Creditor, a Contractual Claimant or a SIHPL Market Purchase Claimant, as defined in Annexure A to this Proposal. Any person who does not meet the definitional requirements of one of the three classes is classified as a Non-Qualifying Claimant and is not subject or bound to the provisions of this Proposal, or to the Adoption or Sanction thereof.