Neutral Citation Number: [2019] EWHC 2234 (Ch) Case No: CR-2019-000789

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2019

**Before** :

**The Honourable Mr Justice Zacaroli**

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**IN THE MATTER OF TRADE HOLDING PL-UK LTD**

**AND IN THE MATTER OF CENTRUM HANDLOWE HIT S.A.**

**AND IN THE MATTER OF THE COMPANIES (CROSS-BORDER MERGERS) REGULATIONS 2007**

**Xena Semikina** (Higher Rights Advocate of Sterling Lawyers) for the Applicant

Hearing dates: 30 July 2019

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# 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.

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## Mr Justice Zacaroli:

1. This is an application for sanction of a cross-border merger, pursuant to regulation 16(1) of the Companies (Cross-Border Merger) Regulations 2007 (the "Regulations").

2. The first applicant, Trade Holding PL-UK Ltd (the "Transferee") is an English company, incorporated on 21 March 2018. The second applicant, Centrum Handlowe HIT S.A. (the "Transferor") is a Polish company, incorporated on 12 April 2018. Both companies are engaged in the business of real estate services.

3. The merger is a merger by absorption of the Transferor into the Transferee. I am satisfied, apart from the issues I address separately below, that the requirements of Regulation 16 are satisfied, such that I would have jurisdiction to make an order approving the completion of the cross-border merger.

4. There is an unresolved issue on the authorities as to whether the Court's function on an application pursuant to Regulation 16(1) extends to considering the impact of the cross-border merger on the creditors of the two merging companies: see for example *M2 Property Invest Limited* [2017] EWHC 3218 (Ch), per Snowden J at [24]-[27] and [57]-[67]. It is unnecessary for me to resolve the issue in this case, since I am satisfied that the cross-border merger will not materially prejudice the creditors of either company. The balance sheet of each company demonstrates that it has substantial assets and minimal liabilities.

5. Regulation 16(1)(d) requires the application for sanction under Regulation 16(1) to be made "on a date not more than 6 months after the making of any order referred to in sub-paragraph (b) or (c)". Sub-paragraph (b) is the pre-merger certificate in relation to each UK merging company and sub-paragraph (c) is the pre-merger certificate in relation to each EEA company.

6. By an order dated 4 July 2019 ICC Judge Jones granted the pre-merger certificate for the Transferee.

7. The pre-merger certificate for the Transferor was granted by Court Clerk Sylwia Kizinska of the District Court for the Capital City of Warsaw, thirteenth commercial division of the National Court Register, on 30 July 2018, some 12 months before the application for sanction was made. Accordingly, one of the jurisdictional requirements under Regulation 16 is not satisfied.

8. At the hearing of the application on 30 July 2019, Ms Semikina, who appeared on behalf of the applicants, submitted that I should waive the requirement that the pre-merger certificate for the Transferor be dated not more than six months ago. She was unable, however, to point to any authority that enabled me to do so. Nothing in the Regulations permits the court to waive any of the jurisdictional requirements. The importance of strict compliance with the Regulations before the Court can sanction a cross-border merger under Regulation 16(1) is emphasised by the decision of Rose J in *Re MDNX Group Holdings Ltd* [2019] BCC 442. In that case, the Court refused to sanction a merger in circumstances where it was apparent on the face of the pre-merger certificate issued by the Scottish Court that the requirements of Regulation 12 were not fully complied with (because the notice required to be published in the Gazette did not include particulars of the time, place and date of the meetings

summoned under Regulation 11). At paragraph 22 Rose J noted that "the discretion of the court to make an order approving the completion of the cross-border merger arises only if the jurisdictional requirements of sub-paras (a) – (f) are met."

9. Ms Semikina also submitted that it was not possible to obtain a further certificate from the Polish court, due to the principle of *res judicata* under Polish law. I have, since the hearing, been provided with evidence of Polish law, in the form of a witness statement from Sylvia Janiszewska, a practising lawyer in Poland, who explains that under Art 363, in conjunction with Article 13(2), of the Code of Civil Proceedings in Poland, a judgment or decision of a court becomes final and cannot be adjudicated upon again, if it has not been appealed. Reliance is also placed on Art. 366 of the Code which provides that a judgment or decision has legal force not only between the parties but as against third parties. Finally, it is said that Art. 365 provides that "third parties" includes any court, authority or administrative body.

10. I have also been provided with a statement from Jurij Zelichowski, another lawyer practising in Poland. He confirms that "to the best of my knowledge, both professional and personal, it is not possible to obtain a second pre-merger certificate in Poland. This is because of the *res judicata* principle which derives from art. 363 of the Code of Civil Proceedings."

11. I am not satisfied, on the basis of this evidence, that it is impossible to seek a further pre-merger certificate from the Polish court in the circumstances of this case. The fact that decisions of the court are binding on the parties and on third parties does not answer the separate question whether the Polish court has jurisdiction to make a *further* order in circumstances where the original order was made too long ago to enable the requirement of Regulation 16(1)(c) of the Regulations to be satisfied. That is particularly so where the "decision" of the Polish court is not one that resolves any dispute between the parties to the merger, but simply verifies the pre-merger process under Polish law had been completed.

12. The Regulations are the implementation in England of Directive 2005/56/EC on cross-border mergers of limited liability companies (the "Directive"). Regulation 16(1)(b) and (c) reflect the provisions of Article 11 of the Directive, which provides as follows:

> "(1) Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16.
>
> (2) To that end each merging company shall submit to the authority referred to in paragraph 1 the certificate referred to in

> Article 10(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 9."

13. The purpose of the time limit in Article 11(2) is, in my judgment, to ensure that at the time the relevant court comes to consider the sanction of the merger it can be satisfied that the certificate from the relevant authority in each member state – confirming its satisfaction that the relevant steps have been taken – is sufficiently current. Regulation 16(1)(d) fulfils the same purpose. I note that under Article 10(2) of the Directive, which provides for the issue of the pre-merger certificate, this is itself to be issued "without delay", which reinforces the view that the purpose behind Article 11(2) is to ensure that the court asked to sanction the scheme has the assurance of a timely approval by the authority in each member state of the pre-merger steps having been undertaken.

14. On the basis of the evidence of Polish law adduced so far, I am not satisfied, given that the timing requirement as to the pre-merger certificate is a requirement that derives from the Directive itself, that the law in Poland is that no further certificate can be issued when the first certificate is incapable of fulfilling the jurisdictional requirement in Article 11(2). As I have already indicated, the res judicata principle, as explained in the evidence, does not seem to me to be a sufficient answer.

15. In his statement, Mr Zelichowski also exhibits a further document from the same court clerk in Poland who signed the original pre-merger certificate. In the translation exhibited to Mr Zelichowski's statement, the document is headed "Decision", and refers to the pre-merger certificate issued on 30 July 2018. It recites that "having considered the case at a closed-door session" on 31 July 2019, the court decides "…to determine that the decision of 2018-07-30 whereby the court determined the compliance with the Polish law – as regards the procedure governed by the Polish law – of the cross-border merger of [the Transferor with the Transferee] is still in force since it has not been appealed against and it is valid and enforceable under Article 363 §1 in conjunction with Article 365 in conjunction with Article 366 in conjunction with Article 13 §2 of the Civil Procedure Code and it does not require any additional procedure concerning the subject matter thereof."

16. It is apparent from the reference to the various articles of the Civil Procedure Code, that this order does no more than declare that the original certificate is binding in accordance with the principle of res judicata under Polish law. It is also apparent that the Polish court was not asked whether - in the circumstances of this case – it is impossible to issue a further pre-merger certificate, notwithstanding the existence of the first one.

17. I have considered whether I can treat the document dated 31 July 2019 as complying with the requirement for a pre-merger certificate from the Polish court made within six months of the application to court for sanction. I am not satisfied, however, that I can. That is because the certificate does no more than confirm that under the res judicata principle in Polish law, the original certificate is still in force. It is apparent from the face of the document of 31 July 2019 that the Polish court has *not* made any fresh certification as to compliance with the pre-merger steps required by Polish law. It has clearly not undertaken any of the inquiries which it is normally required to undertake before issuing a pre-merger certificate. Mr Zelichowski says in his

statement that the judge conducting the inquiry in Poland may, and usually does, request further documents and information in the course of the procedure. That cannot have been done in this case, given that the 31 July 2019 document was produced within 24 hours of the issue having been identified by me at the hearing on 30 July 2019.

18. The applicants contend that since evidence adduced by them indicates that nothing has materially changed since the original certificate was issued by the Polish court, I can for this reason treat the 31 July 2019 document as satisfying the requirement for a pre-merger certificate within the requisite period. The Directive and the Regulations, however, ascribe particular functions to the courts of each relevant member state and I do not think it is open to me to assume that a Polish court, if it had been asked to produce a pre-merger certificate within the requisite time period, would have produced the same certificate.

19. Ms Semikina relied in this respect on *M2 Property Invest Limited* (above). It is true that, at paragraph 47 of his judgment, Snowden J rejected an argument that he was precluded from questioning the validity of the Polish pre-merger certificate in that case because the certificate was a judgement within the Recast Judgment Regulation (EC/1215/2012). He did so, however, because he concluded that the certificate was not a "judgment". At paragraph [50], on the other hand, in dealing with the separate argument whether he was precluded from questioning the validity of the certificate because it was a certificate "conclusively attesting to the proper completion of the premerger acts and formalities" and hence immune from challenge under Article 10(2) of the Directive, he inclined to the view (without deciding) that the court at the sanction stage was indeed bound to accept and give effect to the pre-merger certificate even if aware of facts which might suggest it was issued in error. In my judgment, there is nothing in the *M2 Property Invest* decision that assists the applicants in this case.

20. For these reasons, prior to the matters referred to in the following paragraph, I concluded that the jurisdictional requirement laid down in Regulation 16(1)(d) had not been satisfied in this case, such that I could not sanction the cross-border merger.

21. However, shortly before this judgment was due to be handed down, and following it being sent to the applicants in draft, the applicants have produced further evidence, namely an English translation of a fresh pre-merger certificate issued by the Polish Court, along with a copy of the original document. The fresh certificate is dated 14 August 2019. It is signed by "Judge Olga Rutka" and recites that an application was made on 2 August 2019. It states that the judge, having considered the case at a closed-door session on 14 August 2019 decided to confirm the compliance with Polish law as regards the procedure governed by Polish law for the cross-border merger of the Transferor with the Transferee. In light of this further evidence, I am satisfied that the requirements of Regulation 16(1)(d) have now been satisfied. Insofar as it might be said that this fresh certificate is not dated *before* the application for sanction to this court, I regard the application to this court as continuing to be made to this court as of today's date, and thus after the making of the fresh pre-merger certificate in Poland.