Neutral Citation Number: [2020] EWHC 315 (Ch)

Case No: CR-2019-007586

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Tuesday, 14 January 2020

BEFORE:

THE HONOURABLE MR JUSTICE ZACAROLI

IN THE MATTER OF AMERISUR RESOURCES PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

MR LORD QC appeared on behalf of the Claimants
MR THORNTON appeared on behalf of the Company

APPROVED JUDGMENT

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MR JUSTICE ZACAROLI:

1. This is an application to sanction a scheme of arrangement in respect of the company, Amerisur Resources plc. It is a straightforward scheme which is intended to effect the transfer of the shares of all the shareholders to a new company ("Bidco"), which is part of the purchasing group. Subject to one point of substance I am about to deal with, there is no question that the statutory requirements are all met.

2. The turnout of members at the scheme meeting was low in terms of number, but more than 60 per cent in terms of value, and I am satisfied that in the circumstances of this case it was sufficiently representative of the class of members.

3. There is, however, an objection to the sanction of the scheme, albeit formulated as a request that a condition be imposed on sanction, requiring the company to give an undertaking that it will maintain unencumbered assets in the UK up to at least £6.9 million. This arises in the following circumstances.

4. Mr Lord QC appears before me today on behalf of a number of claimants and proposed claimants in an action commenced in the Queen's Bench Division against the company at the end of 2019. In that action damages are claimed by each of the claimants, the details of which are immaterial for present purposes, save to say that there are a number of people said to be in the same position as the claimants and thus able also to bring claims. The claimants' solicitor are actively seeking out further affected individuals to add to the number of claimants.

5. On 9 January 2020 the claimants, then 15 in number, sought and obtained a freezing order from Steyn J in the Queen's Bench Division. The amount frozen reflected the quantum of the claims of the 15 claimants plus a further, I think, 72 who by that time had been signed up to the action but had not yet been added by amendment as claimants. The total amount frozen was therefore £3,178,600. I am told that if all potential claimants were added as actual claimants then the total quantum of a freezing order on the same basis as that already granted would be £6.9 million. That is the sum sought by way of undertaking as a condition of sanction of the scheme today.

6. The judge in the Queen's Bench Division has taken the view, at least at this stage, that the quantum of the freezing order can only reflect the claims of the actual claimants together with those who were imminently to be added by amendment. It could not, however, reflect the claims of those who might in the future be brought into the action. Mr Lord submits that this court can and should make it a condition of the scheme that such an undertaking is given, notwithstanding he is currently unable to obtain a freezing order in that amount in the Queen's Bench Division. It is common ground that Mr Lord's clients have standing to appear today and make submissions. That is established, if on no other basis, by the decision in *BAT Industries plc* (unreported) 3 September 1998, a decision of Neuberger J (as he then was).

7. It is also common ground that in considering whether it is appropriate to sanction a scheme, it is necessary to take into account not only the scheme document but also ancillary agreements dependent on or linked to the scheme (see, for example *Re Baltic Exchange Ltd* [2016] EWHC 3391). I am entirely satisfied, however, that there are no such ancillary arrangements here that fall within that category. The matters on which Mr Lord relies, which I shall come on to describe in a moment, are not the type of ancillary arrangement envisaged in that or other decisions in which the point has been reiterate.

8. Mr Lord's argument is a slightly different one and hinges on a passage in the decision of Neuberger J in the *BAT Industries* case. That case concerned potential creditors who sought to oppose a scheme on the basis that it might lead to the company having insufficient assets to meet its liabilities to them. At pages 6 to 7 of the decision Neuberger J said the following:

> "The second argument raised by Mr Richards, counsel for the company, arguing that the objectors lacked standing, is that it is not so much the scheme of arrangement but the subsequent dividend in specie whereby the company transfers BAX and Farmers to BAT Reconstructions to which the objectors really object. That is plainly right. The scheme of arrangement as such in no way deprives the company of any assets. Mr Richards rightly points out that the dividend in specie is not part of the scheme of arrangement but a subsequent step which the company, acting by its board of directors, intends to take. 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 having their interests taken into account. 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 sanction and implementation of the scheme. 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 could take into account subsequent steps also for the purposes 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 the steps which will inevitably follow if and when the scheme is implemented."

9. Mr Lord says that a similar concern arises on the facts of this case because of inferences to be drawn from the letter from the chairman of the company which forms part of the scheme documentation. He also relies on the fact that this same point was made in evidence in the freezing injunction application and it has not been answered. I note as to this, however, that the time for service of the company's evidence in response in those proceedings has not yet arrived. Relying on the primary inferences to be drawn from the letter, he refers in particular to a passage which refers to the "intended consolidation of the company into the group of the acquiring company". That, however, refers to consolidation in the purely accounting sense and does not indicate any likely transfer of assets from the company. More substantively, he relies on a passage in paragraph 10 of the letter, which indicates an intention to conduct a careful review of the entire business of the company and the extent of any organisational structural changes that may arise from the acquisition. It goes on to refer to the intention to delist the company from the AIM and to re-register it as a private company, which Mr Lord notes will lead to less transparency going forward. Most importantly, he relies on a passage which indicates a likely shift in the gravity of the company's business from the UK to Colombia, including the relocation of its principal office from Cardiff to Bogota. The paragraph of the letter concludes:

> "Save as set out in respect of the review and their issuer's locations of business in this section, GeoPark [the purchasing group] has no intention to redeploy any of the fixed assets of the Amerisur group."

10. Returning to the *BAT Industries* case, while it is authority for the proposition that creditors of a company have standing to be heard on a sanction hearing in respect of a members' scheme, the objections were in fact all dismissed in that case. It is instructive to refer in full to the reasons given by Neuberger J for dismissing the objections. These are to be found on pages 11 and 12 of the transcript:

> "First, this is a matter where the court's primary concern under s.425 is between the Company and its members. I accept that the primary purpose of the court sanctioning a scheme under s.425(2) is to bind all the members of the Company. I also bear in mind the principle stated in Buckley and the absence of any provision in section 425 equivalent to s.136(3). Insofar as the scheme requires consent under s. 137, the reduction of capital will immediately be followed by a capitalisation so that there will be no net reduction of capital in the scheme for which the approval of the court is sought. That cannot be objected to by the objectors.
>
> Secondly, it is not the scheme to which objection is taken by the objectors but a step which will be taken once the scheme is approved, namely the dividend in specie.
>
> Thirdly, the scheme is not, as a matter of logic or law, a necessary precondition for the dividend in specie. Such a distribution could, at least in principle, be made without any scheme.

> Fourthly, there is nothing in the documentation, which is fairly voluminous, to suggest that the purpose of the scheme, or even one of the purposes of the scheme, or of the making of the dividend in specie, is to deprive the objectors, or any other actual or potential plaintiff, of monies which they might otherwise be able to recover following any judgments that they obtain against the Company in U.S. tobacco litigation …
>
> Fifthly, the legislature has set out in Part VIII of the 1985 Act the requirements which have to be satisfied before a distribution, such as the dividend in specie in the present case, can be made. Those requirements do not include the sanction of the court. It is only because of the happenstance of the scheme requiring the court's sanction under s.425 and s.137 that the issue of the dividend in specie can be raised by the objectors in court at all.
>
> Sixthly, the directors have formed a view that the dividend in specie can be made. That view is not challenged as being dishonest, and cannot on the evidence I have seen be challenged as being unreasonable …
>
> Seventhly, the objectors would have no right to come to court in the absence of this scheme to object to the making of the dividend in specie per se unless they could show that it was part of some sort of process calculated to dispossess them of the potential fruits of the U.S. tobacco proceedings …
>
> Eighthly, the objectors have no present enforceable claims against the Company. They only have potential claims which depend on establishing jurisdiction, liability in law and liability on the facts in the United States against the Company …
>
> Ninthly, in recommending the overall proposals to shareholders and in preparing the interim accounts and deciding to make a dividend in specie, the board has been (and will be) required carefully to consider the financial position of the Company having regard to all relevant factors including the U.S. tobacco litigation. The directors have needed to be satisfied that the Company is legally and financially in a position to pay the dividend in specie, and thereafter to carry on business following the demerger of the net assets of the Company having regard to an actual asset value which will, as I have mentioned, be some £6.5 billion."

Neuberger J went on to sanction the scheme in that case.

11. Many of those points find resonance in this case, in particular the first, second, third, fourth and ninth points, if one replaces the reference to the proposed dividend in specie with the possibility of assets being relocated following a business review. I would make the additional point that the dividend in specie was an inevitable and immediate next step in the *BAT Industries* case, probably sufficiently connected with the scheme to be something that should have been taken into account on the approach identified in *Baltic Exchange Ltd* and other cases I have mentioned. That is not the case here. The potential relocation of assets is far from certain or indeed imminent. Any transfer of

assets away from the company could only be undertaken through procedures compatible with the UK company law, which would require at least the interests of creditors to be protected.

12. At the heart of Mr Lord's case is the submission that, whereas the Queen's Bench Division can only grant relief under the freezing order jurisdiction in relation to actual claimants, when it comes to sanctioning a scheme this court can consider the effect of the scheme on creditors more broadly. He says that creditors more broadly will be adversely affected by the scheme absent the undertaking sought and, he says, existing claimants will themselves be affected adversely because of the potential dilution effect if the freezing injunction continues to be limited to the value of the claims of existing claimants.

13. While the point was attractively made, I reject the claimants' submission on the facts of this case. The scheme itself manifestly has no effect on the interests of creditors whatsoever; it simply effects a change in ownership of the shares. There is no ancillary arrangement that could conceivably be said to impact on creditors' interests. As I have said, the facts in the *BAT Industries* case were a long way from the facts of this case. The company itself could take the steps which the claimants fear without a scheme and without the requirement of any court sanction. I accept that it is one of the commercial consequences of the acquisition by the purchasing group that the possible and feared actions are more likely to occur because the purchasing group is located elsewhere than in the UK, but it is important to note that even that could have been effected without any court order at all if all the shareholders had agreed to the acquisition. This highlights that the scheme, and the court's function in relation to it, is focused primarily on the interest of the scheme participants; that is the members.

14. In short, all that the scheme does, in substance, is to impose the transfer of shares on those members who do not consent to it. I think the more accurate characterisation of the claimants' objection is that it seeks to overcome a hurdle which currently exists in the Queen's Bench Division (that is, limiting the value of the freezing order by reference to existing claimants) through a side door in this division, via the imposition of a condition to the sanction of the scheme. As Mr Thornton, who appears for the company, pointed out, it would do so without the burden (to which it would be subject in seeking a freezing order) of providing a cross-undertaking in damages in relation to the increase in the effectively frozen sum.

15. Accordingly, essentially for similar reasons to those of Neuberger J in the paragraphs I have highlighted above in the *BAT Industries* case, and because the potential future actions about which the claimants are concerned are insufficiently connected with the terms of the scheme itself, I am not persuaded that the objection should lead me to refuse to sanction the scheme or to refuse to do so without imposing the condition sought by the claimants.

16. The remainder of the requirements of sanction of scheme being, as I have said, satisfied in this case, I will therefore make the order sanctioning of scheme.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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