Neutral Citation Number: [2021] EWHC 1347 (Ch)

Case No: CR-2020-003818

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMPANIES COURT (ChD)

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

Date: 19/05/2021

Before:

SIR ALASTAIR NORRIS

- - - - - - - - - - - - - - - - - - - -

IN THE MATTER of WILLIAM HILL PLC

And

IN THE MATTER of THE COMPANIES ACT 2006

- - - - - - - - - -

- -

Andrew Thornton QC (instructed by **Slaughter and May**) for **William Hill PLC**

David Chivers QC and Andrew Blake (instructed by **Travers Smith LLP**) for

HBK Investments LP

Hearing dates: 6 May 2021

- -

APPROVED JUDGMENT

Sir Alastair Norris:

1. This judgment is supplemental to the main judgment (the neutral citation of which is [2021] EWHC 967 (Ch)) recording my reasons for sanctioning the scheme of arrangement: it proceeds on the footing that the reader has read that main judgment.

2. I must now deal with two applications relating to the costs of these proceedings. The Company seeks an order that HBK shall pay to it the extra costs incurred by the Company by reason of the opposition of HBK to the grant of sanction of the scheme of arrangement. HBK seeks an order that the Company shall pay to it the costs which it incurred in opposing the grant of sanction and in seeking a further scheme meeting.

3. The principles by reference to which the costs of applications for sanction under Part 26 of the Companies Act 2006 are determined were recently reviewed by Snowden J in Re Virgin Active [2021] EWHC 991 (Ch). In my judgment this careful summary is now the starting point for deciding costs issues in relation to members or creditors.

4. At paragraph [29] of his judgment Snowden J put matters in this way:-

"…on the basis of the authorities to which I have referred, it seems to me that the following principles can be stated in relation to scheme cases under Part 26,

i) In all cases the issue of costs is in the discretion of the court.

ii) The general rule in relation to costs under CPR 44.2 will ordinarily have no application to an application under Part 8 seeking an order convening scheme meetings or sanctioning a scheme, because the company seeks the approval of the court, not a remedy or relief against another party.

iii) That is not necessarily the case (and hence the general rule under the CPR may apply) in respect of individual applications made within scheme proceedings.

iv) *In determining the appropriate order to make in relation to costs in scheme proceedings, relevant considerations may include,*

a) *that members or creditors should not be deterred from raising genuine issues relating to a scheme in a timely and appropriate manner by concerns over exposure to adverse costs orders;*

b) *that ordering the company to pay the reasonable costs of members or creditors who appear may enable matters of proper concern to be fully ventilated before the court, thereby assisting the court in its scrutiny of the proposals; and*

c) *that the court should not encourage members or creditors to object in the belief that the costs of objecting will be defrayed by someone else.*

v) *The court does not generally make adverse costs orders against objecting members or creditors when their objections (though unsuccessful) are not frivolous and have been of assistance to the court in its scrutiny of the scheme. But the court may make such an adverse costs order if the circumstances justify that order.*

vi) *There is no principle or presumption that the court will order the scheme company to pay the costs of an opposing member or creditor whose objections to a scheme have been unsuccessful. It may do so if the objections have not been frivolous and have assisted the court; or it may make no order as to costs. The decision in each case will depend on all the circumstances.*"

5. Those are essentially the principles by which I am guided in this case. They lead me to the decision to make no order as to costs. The following factors have weighed with me in that exercise of the discretion.

6. First, HBK's token shareholding of 100 shares (worth about £272) is not a material matter when considering costs. It was of advantage to HBK in that: (i) it secured its right to attend the scheme meeting and to ask its two questions; and (ii) it provided the foundation for it to obtain a document from the Company. But the reality is that HBK opposed the grant of sanction not as a member to whom the scheme document was addressed, but as an entity affected by the scheme by virtue of its economic interest in

(eventually) 100 million shares worth (at the offer price) £272 million. HBK was, in reality, not an opposing member (and thus not directly within the guidance given by Snowden J). But the nature of its interest was such that the guidance still provides a useful framework.

7. Second, HBK acquired its interest after the bid announcement and sometimes at prices above the offer price. It bought into the bid situation, rather than being brought into it. It did so at a time when it understood the Company's public position to be that Caesars' had the right to add to or substitute names to a limited list of potential acquirers (whereby inclusion on the list would entitle Caesars to terminate the US joint venture): and it must have bought in with the hope that this might turn out not to be so. It would make no sense to buy at or above the offer price and to hope that the scheme would be approved and sanctioned.

8. Third, it is obvious that HBK's (legitimate) commercial objective was to see whether it could profit from an alternative to the scheme: perhaps by persuading the Company to abandon the scheme in favour of some other means of realising value, or perhaps by counting on a higher offer or a competing bid eventuating because the termination right was not as wide as the public information suggested. The legal costs which it incurred were incurred in seeking to achieve the commercial objective of getting more than the offer price: they were part of the expenditure (alongside acquisition costs) that had to be laid out if the profit was to be earned. They are properly distinguishable from the legal costs incurred (say) by a member at the offer date who considered he should not have his shares appropriated by the bidder at a price which he considered to be too low and who seeks a fair price. It is, on its face, just that the Company should have to pay the costs of a shareholder who requires the Company to justify

why he should give up his shares for what he considers an unfair price. It is not, on its face,; just to expect the Company to pay the business expenses incurred by an opportunistic purchaser of an economic interest in its shares who does not wish the scheme to be approved and sanctioned.

9. Fourth, that is not to say that HBK was involved in the game-playing associated with "bumpitrage". Although "bumpitrage" is used by others in the correspondence passing between HBK and its supporters, it was not a charge directly levelled at HBK: and I have made no finding that HBK was "game-playing". But its commercial objective (if not the means of attaining it) was clear enough. HBK wanted either: (i) an increase in the offer price, from Caesars or from a competing bidder; or (ii) a failure of the scheme and a radically uplifted market price (to increase the premium embedded in the offer price).

10. Fifth, this commercial objective gave HBK a genuine interest in the precise terms of the termination right. HBK wanted to establish that the termination right was not as exclusionary as it said the Explanatory Statement had suggested, and that the prospects of a competing bid were not so remote as might be thought. For HBK it might matter that in relation to the Restricted Acquirers list six names could be changed every six months rather than an unspecified number of names on a limited list amended periodically. This interest would be shared by other acquirers of derivative interests after the bid announcement who shared the same commercial objective: and five such supporters emerged. It was of genuine interest for a particular category of market participant affected by the scheme.

11. Sixth, it was not however a matter of real significance to scheme members (legal or beneficial owners of shares) to whom the Chairman's Letter and the Explanatory

Statement were addressed. They were the addressees of those passages in the scheme document that drew attention to historic share price performance, and for whom the essential question was "Is this a price at which we are content to exit the company?". It was essential for them to know of the existence of the two Restricted Acquirers Lists and of the mutual termination rights; but the precise terms of these rights were relevant only to those like HBK with a very particular perspective.

12. Seventh, the examination of the need to disclose the precise terms of the mutual termination rights did not greatly assist in the scrutiny of the scheme for sanction purposes. The result of that examination was that the assessment of the Company and of its advisers about the necessary level and terms of the disclosure was proved ultimately to be right: and that there were no grounds for thinking that if the new information provided at the scheme meeting had been included in the Explanatory Statement, then votes would have been cast differently or that abstainers would have voted. This is not a case therefore in which HBK, whilst having a genuine question relevant to its own particular interests, can be said to have greatly assisted the Court in its scrutiny of the scheme overall, such that its costs ought to be paid by the Company.

13. Eighth, that assessment does not, however, mean that HBK should be the subject of an adverse costs order. Mr Thornton QC submitted that, in the light of my conclusion that it made the right assessment of the disclosure needs, the conduct of the Company cannot be criticised. But the Company took three risky decisions. First, it decided to summarise (rather than substantially quote) the termination right in the Explanatory Statement: it has never given its reasons for that choice. Second, it decided not to make any public announcement providing further details of the termination right prior to the scheme meeting although it knew that HBK was seriously pressing for further

information (to Barclays on 27 October 2020 and to the Takeover Panel on 30 October and 2 November 2020 and directly to the Company on 18 November 2020). Third, it made no public announcement relating to the new information provided at the scheme meeting. These decisions (whilst correctly assessing materiality) increased the risk of a challenge being mounted at the sanction hearing.

14. Ninth, HBK was not alone in its criticism of the disclosure made in the Explanatory Statement. It was joined by others. It alone appeared at the sanction hearing, to explain to the Court the nature of its objection: but it is not, on that account, to be treated more severely than objectors who made only written objections (which the Company was bound to address at the sanction hearing, but on which the Court was not assisted by argument from the objectors).