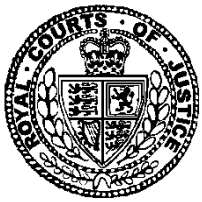

Neutral Citation Number: [2021] EWHC 29 (Ch)

Case No: CR-2021-000003

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

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

Date: 7 January 2021

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF PA CONSULTING GROUP LIMITED

AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

- -

Martin Moore QC (instructed by **Linklaters LLP**) for the **Applicant Company**

Hearing date: 7 January 2021

- -

Approved Judgment

COVID-19: Judgment was given ex tempore on 7 January 2021. This approved version will be handed down remotely by circulation to the parties' representatives by email and will also be released for publication on BAILII and other websites at 2 p.m. on Friday 8 January 2021.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. PA Consulting Group Limited (the "Company") seeks an order convening meetings of three classes of its members to consider, and if thought fit, approve a scheme of arrangement (the "Scheme") under Part 26 Companies Act 2006. The purpose of the Scheme is the acquisition of the entire issued share capital of the Company by Green Consulting Solutions Limited ("Bidco"), a newly incorporated company controlled by Jacobs Engineering Group Inc. ("Jacobs").

2. The aggregate consideration payable for the shares in the Company under the Scheme and an associated purchase of loan notes issued by a subsidiary of the Company is about £1.795 bn. It is to be satisfied partly in cash and partly in ordinary and preference shares in Bidco in varying proportions between the cash and share consideration, depending upon the characteristics of the existing shareholders of the Company and the shares held by them.

3. The issues to be determined at this convening hearing are the correct composition of classes and the arrangements for the holding of the Court meetings by remote means. Pursuant to the Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) [2020] 1 W.L.R.4493, the Company sent a letter by email to its members on 14 December 2020 outlining the transaction and the proposed classes. No member has appeared today to oppose the relief sought by the Company.

4. In summary, due to the complexity of the capital structure of the Company and the various forms of consideration payable under the Scheme, the Company considers there should be ten separate classes of members to consider the Scheme. It will not, however, be necessary to convene ten Court meetings because, in respect of seven of the proposed classes, the members of the class concerned are few in number and have all agreed to undertake to the Court be bound by the Scheme.

The capital structure

5. The capital of the Company is divided into 4 classes of shares as follows:

   i) 38,250,000 A ordinary shares of £0.01 each (the "A Ordinary Shares")

   ii) 34,886,530 B ordinary shares of £0.01 each (the "B Ordinary Shares")

   iii) 17,073,708 C ordinary shares of £0.01 each (the "C Ordinary Shares")

   iv) 134,461,347 preference shares of £0.01 each (the "Preference Shares")

6. In addition to the share capital, there are outstanding loan notes issued by a subsidiary of the Company by an instrument dated 10 December 2015 in the principal amount of £147,425,000 (the "ILNs") which have a 12% coupon. By virtue of the provisions of a shareholders' agreement, the Preference Shares and the ILNs are to be treated *pari passu* including (without limitation) in respect of proceeds received on an "Exit" (which would include the Scheme).

7. The A Ordinary Shares and ILNs are only held by CEP IV Garden S.à r.l (the "Investor") which is a holding company forming part of the Carlyle Group, a well-known private equity house. The rest of the share capital is held between 2,231 members of management or employees of the Company or members of its Group, and by Apex Financial Services (Trust Company) Limited in its capacity as trustee of the PA 2004 ESOP (the "EBT"), which holds shares acquired from employee shareholders who have ceased to be employed by the Group.

8. The A Ordinary Shares and B Ordinary Shares rank *pari passu* as a single class save for the fact that the A Ordinary shares (i) carry enhanced voting rights on certain matters of interest to an investor such as appointing/removing senior executives, and (ii) benefit from more favourable transfer provisions than those available to holders of B Ordinary Shares or C Ordinary Shares.

9. The C Ordinary Shares are intended to operate as an incentive class of shares issued to employees which do not carry voting rights. They vest as to 50% over a period of three years and then become fully vested prior to, and conditionally upon, an "Exit" such as this Scheme.

10. The Preference Shares are entitled to a fixed cumulative coupon of 12% per annum, which in practice has rolled up annually. The Preference Shares do not carry any voting rights and are only transferable on the same basis as the B Ordinary Shares and C Ordinary Shares.

11. The returns to shareholders, whether as to dividend or returns of capital, are set out in Articles 3 and 4 of the Company's articles of association, which provide a "Waterfall" as to amounts and priority. In relation to a return of capital, for example, the Waterfall provides for payments of dividend or capital as follows:

    i) in paying to holders of the Preference Shares the amount paid up on the share plus any premium, together with any accrued but unpaid dividends;

    ii) in paying to holders of the A Ordinary Shares and the B Ordinary Shares as a class (the "Voting Ordinary Shares") the "Reinvestment Percentage" (currently 75%) of the balance; and

    iii) in paying to the C Ordinary Shares as a class the "Sweet Percentage" (currently 25%) of the balance.

<u>The Scheme and the Implementation Deed</u>

12. The acquisition of the Scheme Shares will take place pursuant to the Scheme. The transfer of the ILNs will take place pursuant to an implementation deed dated 27 November 2020 made between (inter alia) the Company, the Investor, Bidco and Jacobs (the "Implementation Deed").

13. The aggregate consideration for the acquisition of the Scheme Shares and the ILNs will be £1.795 bn with some debits and credits (the "Overall Consideration"). The value ascribed to the ILNs is about £248 m plus accrued interest to the effective date of the Scheme (the "Loan Note Consideration") and the value of the consideration for

the Preference Shares is about £226 m plus accrued interest to the effective date of the Scheme (the "Preference Share Consideration").

14. The balance of the Overall Consideration (about £1.321 bn - the "Ordinary Share Consideration") will be divided amongst the three classes of ordinary share capital in the same manner as would have been the case with a return of capital under the Waterfall – i.e. 75% will be allocated to the A Ordinary Shares and B Ordinary Shares as a class of Voting Ordinary Shares, and 25% will be allocated to the (non-voting) C Ordinary Shares.

15. Although the proportion of the Overall Consideration to be received by each group of stakeholders will track that which they would receive under the Waterfall in the Articles, the Scheme provides for it to be received in different forms. This is because it has been part of the ethos of the Company that those actively engaged in the business should have an equity participation in it, and Jacobs has embraced that ethos. Thus, the Scheme Shareholders will be divided into four categories: (i) the Investor, for whom the Scheme is an exit in accordance with its investment strategy; (ii) two managers, who do not wish to continue to have a role in the Company (the "Exiting Managers"); (iii) managers and employees who will have a continuing role in the Company (the "Rolling Managers") and (iv) the EBT.

16. The Overall Consideration will be settled under the Scheme as follows:

    i) The Investor will receive the relevant proportion of the Ordinary Share Consideration allocated to each Voting Ordinary Share in respect of each A Ordinary Share held by it, wholly in cash.

    ii) The Exiting Managers will receive in respect of their relevant entitlements (i) the relevant proportion of the Preference Share Consideration in respect of each Preference Share held by them, (ii) the relevant proportion of the Ordinary Share Consideration in respect of each B Ordinary Share held by them, and (iii) the relevant proportion of the Ordinary Share Consideration in respect of each C Ordinary Share held by them, in each case, wholly in cash.

    iii) The Rolling Managers will receive, in the absence of any election, their relevant entitlements as to 50% in cash and as to 50% in shares in Bidco ("the Consideration Shares"). The Consideration Shares comprise a B Ordinary Share of £0.05 at an issue price of £0.05 and a Bidco Preference Share of £0.01 at an issue price of £1.00 and in the ratio of one Bidco Ordinary Share to 5.6 Bidco Preference Shares.

    iv) The Rolling Managers are given an opportunity to elect to receive up to 100% of their entitlements in respect of each class in Consideration Shares, but they must elect the same proportion in respect of each class of shares held by them. Further, because it is a term of the Scheme that no more than the "Scale-back Percentage" (being a percentage of approximately 56%, determined in accordance with the Scheme) of the value of the consideration due to Rolling Managers as a whole can be satisfied by the issue of Consideration Shares, the elections may be subject to scaling back on an equal basis where such aggregate value of the Consideration Shares due to the Rolling Managers pursuant to their elections is in excess of the Scale-back Percentage.

v) The EBT will receive its relevant entitlement (i) if the Scale-back Percentage of the value of the consideration due to Rolling Managers as a whole by virtue of valid elections is to be satisfied by the issue of Consideration Shares, entirely in cash; or (ii) if less than the Scale-back Percentage of the value of the consideration due to Rolling Managers is to be satisfied by the issue of Consideration Shares, a percentage of the consideration due to it in Consideration Shares in an amount which ensures that the aggregate value of the Consideration Shares due to the Rolling Managers and the EBT represents the Scale-back Percentage of the value of the consideration due to Rolling Managers as a whole.

17. The Scheme also contains provisions which permit shareholders to receive the consideration under the Scheme in the most tax efficient method possible. Thus, it permits Rolling Managers to elect to structure their rollover as an acquisition for cash to be used to immediately subscribe in cash for their Consideration Shares rather than an issue in consideration of the transfer of their relevant Scheme Shares. This allows shareholders to crystallise a capital gains tax liability at the time of the acquisition if that is what they want. Similarly, the Scheme provides that Rolling Managers can elect to ascribe the consideration received as Consideration Shares first to their C Ordinary Shares (if any), then to their B Ordinary Shares and, thereafter, to their Preference Shares. In this way, Rolling Managers can allocate the cash consideration to the security with a higher base cost if that is what they wish to do for tax purposes.

18. Finally, the Scheme permits any amounts due to the Company from a member or which it is required to deduct by law to be deducted from the cash to be received by a relevant member.

Acquisition-related agreements

19. There are two relevant agreements which form part of the background of the Scheme. These are the Implementation Deed mentioned above and a "Management Warranty Deed" entered into by certain shareholders and Bidco on 27 November 2020.

20. In addition to providing for the acquisition of the ILNs, the Implementation Deed contains covenants from certain shareholders (the "Covenantors") as to the conduct of the acquisition and the conduct of the business pending completion of the acquisition. It also contains the concepts which drive the adjustments to the Overall Consideration of £1.795 bn. The Implementation Deed also introduces the concept of "Leakage" which broadly equates to any reduction in value of the group by distributions or payments to the Investor or the Covenantors after 3 July 2020. This may result in the cash consideration due to the Investor and the Covenantors being reduced by the amount of Leakage (if any) received by them or for their benefit.

21. The Management Warranty Deed provides for the giving of warranties by the Covenantors and one other (the "Warrantors") and for disclosure to be made against those warranties in a disclosure letter which was entered into on 27 November 2020. Save in respect of fraud, the ability of Bidco to claim on the warranties is limited to an aggregate liability cap of £1 and a warranty and indemnity insurance policy has also been put in place in respect of claims pursuant to the Management Warranty Deed (save in the case of fraud).

The law in relation to class composition

22. The class question is essentially whether the scheme is a single arrangement between the company and its members, or a number of linked arrangements with distinct classes of members so as to require separate class meetings. For present purposes, the following relevant principles can be derived from the authorities, which include, in particular, Sovereign Life Assurance Co v Dodd [1892] 2 QB 573; Re Hawk Insurance Co Limited [2001] 2 BCLC 48; Re Telewest Communications plc [2005] 1 BCLC 752; and (in relation to proposition (v)), Re Baltic Exchange Limited [2016] EWHC 3391 (Ch) at [15]-[17],

    i) the question of class composition is answered by reference to an analysis of members' rights rather than interests. Members fall within the same class if their rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest;

    ii) the question of whether the rights of members are so dissimilar as to prevent them from constituting a single class depends on an analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied;

    iii) the fact that there may be certain differences between the rights of members does not mean that they must be placed in separate classes for the purposes of considering a scheme. A broad approach is to be taken: accordingly, differences may be material without leading to separate classes;

    iv) if members have similar rights under a proposed scheme, but different commercial interests, this does not affect the issue of class composition but may be relevant to the exercise of the Court's discretion to sanction the scheme; and

    v) in assessing whether the classes have been correctly constituted for the purposes of a scheme, the Court should not simply look at a scheme in isolation, but should do so together with other arrangements entered into collaterally with the scheme.

Analysis

23. There are two significant differences in existing rights and rights to be conferred under the Scheme which divide the membership of the Company. The first derives from the differences in the share rights attached to the four classes of share and the fact that those differences are reflected in the division of the Overall Consideration to be received under the Scheme. The second derives from the additional rights which the Scheme gives to certain groups of members to elect to receive the consideration provided to them in different forms.

24. Mr. Moore QC submits, and I accept, that the Investor is clearly the recipient of a unique deal in that it holds all the A Ordinary Shares, is getting cash and in addition is disposing of its ILNs pursuant to the Implementation Deed. It should plainly form a class of its own.

25. Mr. Moore QC then advanced two alternative arguments as to the formulation of the remaining classes.

26. Under the first (and Mr. Moore QC's preferred) proposal, shareholders would be divided into classes both by reference to the different existing shares that they hold (B Ordinary Shares, C Ordinary Shares and Preference Shares), and also in relation to their different treatment as to the form of consideration that they will receive under the Scheme depending upon whether they are Exiting Managers, Rolling Managers or the EBT. This would give rise to (three x three =) nine separate classes in addition to the Investor. Of these, however, since there are only two Exiting Managers and one EBT, they will simply consent to the Scheme, leaving only three classes of Rolling Managers to be summoned to vote at separate Court meetings.

27. Mr. Moore QC's alternative is that the Exiting Managers, the Rolling Managers and the EBT could form separate classes but the classes would not be further sub-divided by reference to their holdings of Preference Shares, B Ordinary Shares and C Ordinary Shares. On this analysis, there would therefore only be three classes in addition to the Investor, of which two would consent, leaving only one class of Rolling Managers.

28. At the hearing, I raised a possible variant upon that alternative, which is that if the Rolling Managers who hold B Ordinary Shares and Preference Shares do so in uniform proportions (because the evidence was that in practice those shares are "stapled" together) the Rolling Managers who hold those shares could be combined into a single class.

29. I accept that a shareholder who is getting only cash is subject to a different arrangement to a shareholder who will receive a mix of cash and Consideration Shares. Consideration Shares carry inherent benefits and risks which are not present in a cash payment. Thus, the Exiting Managers who are only going to receive cash for their shares must be in a class of their own.

30. I also agree with Mr. Moore QC that a shareholder whose proportion of cash or Consideration Shares will be determined by an election made by them, even if it is subject to scaling back, is being offered a materially different proposal than a shareholder whose proportion of cash and Consideration Shares will not be a result of choices made by that shareholder. That effect of that difference for class purposes is accentuated where the proportion of cash or shares which one group of shareholders may elect to receive will directly affect or limit what another group can receive.

31. Thus, the Rolling Managers must be in a different class than the EBT, because there are a limited number of Consideration Shares available to be issued to the Rolling Managers and the EBT together, and the number of such shares (if any) that will be issued to the EBT depends upon the elections made by the Rolling Managers as a whole. So, if the Rolling Managers collectively decide to take less than the Scale-back Percentage in Consideration Shares, the balance of Consideration Shares that would otherwise have been issued to the Rolling Managers (up to the Scale-back Percentage) will be issued to the EBT: and if the Rolling Managers decide to take up the maximum Scale-back Percentage in Consideration Shares, the EBT will receive cash only.

32. The remaining class question therefore boils down to whether the Rolling Managers should be required to vote at one, two or three separate meetings in respect of their separate holdings of Preference Shares, B Ordinary Shares or C Ordinary Shares.

33. There is some superficial attraction to simply convening a single meeting of the Rolling Managers, not least because the Court generally seeks to avoid excessive subdivision of voting classes on a Part 26 scheme. That avoids giving unwarranted rights of veto over the entire scheme to small groups of shareholders, or running the practical risk that one of the classes contains so few members that there is a real possibility that it might be inquorate.

34. Mr. Moore QC submitted, however, that this would be too simplistic an approach in the instant case because it would ignore the fundamental differences between the existing value of the rights attaching to a holding of Preference Shares, B Ordinary Shares or C Ordinary Shares which the Scheme Shareholders are being required to give up under the Scheme. He submitted that the Preference Shares are a very different interest in the Company compared to the B Ordinary Shares and the C Ordinary Shares: he suggested that they are more in the nature of debt to equity and have no voting rights. Likewise, he submitted, the B Ordinary Shares and the C Ordinary Shares are different. A holder of B Ordinary Shares will need to factor in the loss of voting rights into the assessment of the Scheme which will not be a feature for the holder of a C Ordinary Share; and a holder C Ordinary Shares will have regard to the entitlement to the Sweet Percentage in evaluating the Scheme whilst the holder of B Ordinary Shares is entitled to a different Reinvestment Percentage.

35. In practical terms, Mr. Moore QC also confirmed (on instructions) that not all of the Rolling Managers have the same or similar holdings across the three different types of shares. Thus, there will be some Rolling Managers who have a higher proportion of C Ordinary Shares and others who will have a higher proportion of Preference Shares and B Ordinary Shares. This means that not all the Rolling Managers will have the same mix of existing rights which will be affected by the Scheme.

36. Mr. Moore QC also told me (again on instructions) that although the B Ordinary Shares and the Preference Shares have in practice been treated as stapled together, such that at the present they are held in the same proportions by the Rolling Managers who hold them, this might change. Though technically possible, I am not convinced that this is a real likelihood prior to voting on the Scheme.

37. Finally, however, Mr. Moore QC made the point that all of the Scheme documentation has been drafted and advertised in the Practice Statement letter to Scheme Shareholders on the basis that the B Ordinary Shares and the Preference Shares would be voted at separate class meetings, so there would be little to be gained and some extra costs, administrative inconvenience and possible confusion caused if they were now to be combined.

38. On the basis that there is no uniformity of holdings across all three types of Scheme Shares, and given that they each have materially different rights, I accept Mr. Moore QC's submission that I should not simply order one meeting of all Rolling Managers covering all Share types. Applying the class tests outlined above leads to the conclusion that there should be three separate meetings as the Company proposes.

39. I also do not consider that I should require the Company to combine the meetings of the Rolling Managers in respect of their holdings of B Ordinary Shares and Preference Shares. My suggestion to that effect was based upon the fact that those shares have, in practice, been "stapled" together so there is a commonality of holders across the two classes for the time being, and holding one less meeting of the same people voting in the same proportions might be more administratively convenient. That essentially pragmatic suggestion does not, however, change the result of applying the class test to the different rights of the shareholders as a matter of law. Accordingly if, for the reasons identified by Mr. Moore QC, the Company would not find it convenient, and indeed would be caused extra expense and administrative inconvenience in redrafting its documentation to combine those meetings, then I do not think I should require it to do so.

40. The consequence is that it will be for the Company to ensure that the Rolling Managers are reminded to vote at each of the meetings in respect of their separate holdings of relevant Shares. Assuming this is done, the comparatively large number of Rolling Managers (in excess of 2,000) means that the risk of the second or third of the Court meetings becoming inquorate by accident is negligible.

41. For completeness I should add that Mr. Moore QC also brought to my attention a number of further possible arguments as to why the classes to which I have referred should be further sub-divided.

42. By way of example, he drew attention to the fact that the Covenantors may have their cash consideration reduced in the event of Leakage pursuant to the Implementation Deed. But the fact that those Rolling Managers might suffer a reduction in the sums they receive is a negative possibility to which the other members of the class are not subject. The Covenantors freely agreed to that term and it is not one that might cause them to vote in favour of the Scheme when they would otherwise not do so. It is for the same reason that the fact that the Warrantors have given warranties under the Management Warranty Deed does not fracture the class of Rolling Managers. In any event with a limit of £1, save in respect of the warrantor's own fraud, the exposure is de minimis.

43. The other matters raised by Mr. Moore QC essentially concerned the options given to Rolling Managers to arrange their receipt of consideration under the Scheme in a tax efficient manner for them. Those options are offered to all and any differences in the ability of particular Rolling Managers to use those opportunities are the result of their individual interests rather than any differences in rights against the Company. Moreover, it would be practically impossible to arrive at any coherent definition of classes on the basis of the many different personal circumstances of the individual Rolling Managers. They therefore do not justify any further sub-division of the classes to which I have referred.

Convening the Court meetings

44. The Court meetings are proposed to be held virtually given the current COVID-19 restrictions. That is necessary given the current restrictions and provided for under the Corporate Insolvency and Governance Act 2020 (the "CIGA") which provides in paragraph 3 of Schedule 14 (among other things) that members of a qualifying body (such as the Company) are not entitled to insist on being present in person or to

participate in a class meeting of members of that body other than by voting: see Re Columbus Energy Resources plc [2020] EWHC 2452 (Ch) at [17]-[23].

45. Notwithstanding that position, the Company's proposals as outlined in paragraphs 42 and 43 of the witness statement of John Alexander dated 4 January 2021 are designed to ensure that members can submit written questions and remarks by remote means notwithstanding the lack of physical attendance at a meeting. They involve the use of a virtual meeting platform provided by Lumi and accessible by most web browsers on a personal computer, smartphone or other device. I am satisfied that those arrangements are appropriate and ought to ensure that Rolling Managers can in fact participate in the Court meetings by remote means if they wish.

46. I should add that although the CIGA may have created a technical difference between the requirements for participation at a meeting of creditors and a meeting of members for the purposes of the scheme jurisdiction, it would nonetheless be desirable for the Company (via the Chairman of the meetings) to provide evidence for the sanction hearing as to the holding of the meetings of the type outlined by Trower J in Re Castle Trust Direct plc [2020] EWHC 969 (Ch) at [43].

Conclusion

47. Subject to a minor amendment to refer to the Company's proposals outlined in Mr. Alexander's witness statement for holding the class meetings by remote means, I shall therefore make an order convening the three Court meetings as requested by the Company in the form of the draft provided.