Neutral Citation Number: [2022] EWHC 1283 (Ch)

Case No: CR-2022-000340

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

Rolls Building,
Fetter Lane,
London, EC4A 1NL

Date: 26th May 2022

Before :

THE HON MR JUSTICE MELLOR

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IN THE MATTER OF ORTHO CLINICAL DIAGNOSTICS HOLDINGS PLC

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Martin Moore QC (instructed by **Latham & Watkins (London) LLP**) for the **Applicant**

Hearing date: 26th May 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the applicant's representatives by email and release to The National Archives and BAILII. The date and time for hand-down is deemed to be Thursday 26th May 2022 at 1 pm.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

1. This is an application pursuant to Section 899 of the Companies Act 2006 for sanction of a scheme of arrangement (the Scheme) between Ortho Clinical Diagnostics Holdings Plc (the Company) and the holders of its ordinary shares of par value $0.00001 each (the Scheme Shares).

2. Counsel for the Company, Mr Martin Moore QC, provided a very helpful Skeleton Argument and I was able to read all the materials he suggested I should read in advance of the hearing.

3. The Scheme is part of a larger transaction giving effect to a Business Combination Agreement dated 22nd December 2021 which aims to merge two businesses – the Company (i.e. the Ortho business) and the business of Quidel Corporation (Quidel).

4. Quidel commenced operations in 1979 originally as Monoclonal Antibodies Inc in California. Its business is in the development manufacture and marketing of rapid diagnostic testing solutions, which are distributed globally. Although now registered in Delaware, Quidel's headquarters remain in California.

5. Ortho began business over 80 years ago. It is described in the scheme documents as a global provider of in-vitro diagnostic (IVD) solutions to the clinical laboratory and transfusion medicine communities. Throughout its history, the headquarters of the group have been based in New Jersey, USA, although the Company is a UK company with its registered office in Bridgend in Wales. It became the holding company of the Ortho business on an initial public offering on 25th January 2021 whereunder the Company's shares were admitted to trading on Nasdaq.

6. The ultimate aim of the overall transaction is that a company called Coronado Topco Inc (Topco) will become the new holding company of the combined businesses, being held beneficially as to approximately 38% by former beneficial shareholders of the Scheme Shares and approximately 62% by former beneficial holders of Quidel stock. Topco shares will be listed on Nasdaq and the stock of the Company and Quidel will be de-listed from Nasdaq as part of the transaction.

7. The overall transaction involves a Delaware law merger and this Scheme of Arrangement. The purpose of the Scheme is to effect the acquisition of the entire issued share capital of the Company by Topco. Each Scheme Share will be acquired by a depositary nominee of Topco in consideration of (i) 0.1055 shares of common stock in Topco, par value USD0.001 and (ii) a payment of USD7.14 provided to Topco by Quidel so that Topco can settle such cash amounts as become payable on the Scheme becoming effective.

8. Although the Company is a public limited company incorporated in England & Wales, counsel characterised it as alike to a US corporation as it is possible to get. This manifests itself in the fact that its ordinary share capital is held through a small number of registered holders (in this case, two), acting as nominees for those who hold the beneficial and economic interests in dematerialised form. Perhaps not surprisingly, the form and

substance of the documents generated to effect the combination of the Company and Quidel have a distinctly US flavour and reflect US market practice for such agreements. However, the document explaining the Scheme and the wider transaction is a Registration Statement on Form S-4 under the United States Securities Act of 1933. It has been adapted to incorporate the mandated material required for the Scheme by the Companies Act 2006 and the practice of the High Court. It has been referred to as the Proxy Statement. It is a substantial document addressed to the Company's and Quidel's investors.

9. The Scheme was unanimously recommended by the directors of the company (along with other steps required to effect the overall transaction), and the directors set out their detailed reasoning for their recommendation of the scheme in the Form S-4.

10. By the order of Michael Green J. sealed on 16th February 2022, the company was given permission to convene a single class meeting of members of the Company and the Judge also gave directions in relation to that meeting. I have read the Judgment given by Michael Green J (who I will refer to as the Judge) at the convening hearing: [2022] EWHC 675 (Ch). There was no issue as to jurisdiction because it is a Part 26 Scheme and it concerns a relevant company incorporated in England & Wales. He had to consider two issues in particular: first, as to class composition and second, the numerosity issue.

11. As at 4th February 2022 (referred to as the Service Record Date), the Company had two registered holders of its ordinary shares which I will refer to as Computershare and Cede & Co respectively. The Company has a single large beneficial shareholder Carlyle, which is an affiliate of a well-known private equity house, the Carlyle Group. It holds the beneficial interest in a certain number of shares which represent approximately 49.79% of the ordinary shares of the Company, the legal title to which is held by Computershare. The beneficial interest in the balance of the ordinary shares held by Computershare is held by other early investors in the Group i.e. management and other employees. So far as the ordinary shares held by Cede & Co are concerned, the beneficial interest in those is held by institutional investors and individual shareholders mostly based in the US.

12. The class composition issue required Michael Green J. to consider whether Carlyle is in a separate class from the other ordinary shareholders by virtue of certain agreements to which it is a party and certain rights which it possesses. He concluded that the essential question was whether the shareholders have a common interest such that they can fairly consult together. The common interest was whether they wish the Company to merge with Quidel such that they will become shareholders in the new entity on the same terms as before. He was satisfied that only one meeting of scheme shareholders was required but pointed out at [26] that it would be open to the Court at the sanction hearing to consider whether Carlyle was promoting its own interests contrary to the interests of the class of which it is a member.

13. The Judge also considered whether the interests of the executive directors and employees' interests in the scheme by virtue of their positions affected class composition but decided they did not.

14. As for the numerosity issue, that arose out of the requirement in s.899 for a majority in number of the members attending the meeting to approve the scheme. The Judge discussed the various solutions which have been adopted to this relatively common problem, principally by reference to the judgment of Snowden J. (as he then was) in *Re GW Pharmaceuticals PLC* [2021] EWHC 716 (Ch), and stated his conclusions in the following two paragraphs:

> '32. I find this quite difficult. The trouble is respecting the purpose of the majority in number test required by the statute. This aims to give shareholders big or small a certain amount of equality in terms of the voting. However, Snowden J's solution gives priority to value which is, in any event, covered by the 75 per cent majority test. However, it would still be vulnerable, in principle, to small shareholders deciding to convert and get themselves on the register for the purposes of the headcount at the meeting. It is therefore still possible for them to exert the influence that the statute gives them. It is just that they need to get on the register in time for the meeting. The position can also, it seems to me, still be reviewed at the sanction stage if it is felt that the situation has been taken unfair advantage of by a majority shareholder.
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> 33. I therefore think that, on balance, in these circumstances it is best to adopt Snowden J's test and to allow the nominee shareholders to vote in accordance with the majority wishes of their underlying beneficial holders and that is what I will direct.'

15. The final matters considered by the Judge concerned the holding of the meeting in the United States, the arrangements for remote access, voting and timing and the content of the explanatory memorandum to be distributed to all shareholders.

16. For the purposes of this hearing, I have read the following witness statements:

    a. The first witness statement of Christopher Smith, the Chairman and CEO of the Company, dated 7th February 2022, made in support of the Company's application for permission to convene a meeting for the purpose of considering the proposed Scheme.

    b. The witness statement of John Ruocco, a manager at Computershare, dated 19th May 2022. The purpose of his witness statement was to confirm the identity of the registered shareholders of the Company at relevant dates.

    c. The witness statement of Joanne Vogel, also dated 19th May 2022. She is a manager at Broadridge Financial Solutions Inc. Her role was twofold. First, to ensure that the Form S-4 (i.e. containing the Explanatory Statement) and accompanying documents were received by all those having a beneficial interest in a Scheme Share, whether held by Computershare or Cede & Co. Second, to oversee the receipt and collation by her Company of the voting instructions from the beneficial shareholders and to send the Final Vote Report to the scrutineer. She reports that there had been a slight change in the Beneficial Shareholders between the Service Record Date of 4th April 2022 and the Voting Record Date

of 12 May 2022. Shareholders holding a beneficial interest in some 2.6m shares no longer held such interests at the Voting Record Date, so any votes they had cast were removed from the Updated Final Vote Report which she exhibits and summarises in her witness statement.

d. The second witness statement of Christopher Smith, in which he reports on the circulation of Form S-4 and accompanying documents, what occurred at the Court meeting on 16th May 2022, notification of this Sanction Hearing to Scheme and Beneficial Shareholders and the further conditions which need to be satisfied so that the Scheme and the proposed combination are implemented. Amongst other documents, he exhibits his Chairman's Report of the business transacted at the Court meeting, prepared in accordance with the directions ordered by Michael Green J. Annexed to his Report was a copy of the Scheme as approved at the meeting.

17. The meeting convened by the Court took place on 16th May 2022 under the chairmanship of Christopher Smith. The resolution to approve the Scheme was passed by a very substantial majority in both number and value, namely 100% and 92.54% respectively of those present and voting. The turnout was 88.27% by value and 100% by number. As Counsel pointed out, those 100% figures are a function of (a) the fact that there were only two registered shareholders and (b) the operation of the *GW Pharmaceutical* direction in the Convening Order. Of the total Scheme Shares voted of 209,893,954, there were 15,655,010 shares voted against, accounting for 7.46% of those present and voting. The general meeting on 16th May 2022 also approved by the necessary majorities other resolutions necessary to effect the overall transaction. All the results were set out in an announcement on 20th May 2022.

18. No shareholder appeared at the hearing today, nor has any person given notice that they wish to object to the scheme. In particular, there appears to be no reason to re-consider the position of Carlyle (cf [26] and [32] in the Judgment of Michael Green J.). Indeed, Mr Moore informed me that even had Carlyle stepped back and not voted, the resolution in favour of the Scheme would still have been passed with a majority of 83%.

Legal test

19. In terms of the legal test, Counsel referred me to the long-approved passage in *Buckley on the Companies Acts* as to the court's approach to the question whether to sanction a scheme of arrangement pursuant to section 899 of the Companies Act 2006. That passage was summarised by Morgan J in *Re TDG plc* [2008] EWHC 2334 (Ch) as involving four principal matters: first, whether the statutory provisions had been complied with; second, whether the class was fairly represented at the meeting or meetings and whether there was any coercion of the minority by the majority; third, whether the scheme is a fair scheme which a member of the class concerned acting in respect of their own interest could reasonably approve; and fourth, whether there is any blot on the scheme, in other words a defect which would make it unlawful or inoperative.

Compliance with statutory provisions

20. In terms of compliance with the statutory provisions, I am entirely satisfied on the basis of the evidence before me that the relevant provisions of the Companies Act have been complied with.

21. First, as I outlined above, the arrangement involves the transfer of shares in the Company in exchange for shares in Topco and a cash payment. It clearly contains the necessary ingredients of "give and take".

22. Second, the principles relevant to class constitution under Part 26 CA 2006 were considered by Michael Green J and no person appears to argue that the convening of a single class of holders of Scheme Shares was wrong.

23. The requirements of s 897 of the 2006 Act have been satisfied in that a detailed Proxy Statement was made available to the shareholders of the Company which included the Explanatory Statement. The Proxy Statement was distributed to the shareholders in the manner specified by the Order: see the second witness statement of Mr Smith. The witness statements of John Ruocco and Joanna Vogel show that the documentation was distributed to the registered shareholders and to the banks, brokers and other intermediaries that hold interests in the Company's ordinary shares through The Depositary Trust Company system on behalf of the underlying beneficial owners for onwards distribution to such beneficial owners, as is US practice.

24. The interests of the directors were disclosed in the Explanatory Statement.

25. The notice of the Court meeting was at the front of the Proxy Statement, which also contained a summary of the opinion of J.P. Morgan Securities LLC, who were retained as financial adviser to Ortho, to the effect that the terms of Scheme were fair from a financial point of view to the holders of Scheme Shares.

26. The meeting took place on 16th May 2022, and the Scheme received very considerable support, as I have already mentioned.

Fair representation of the class at the meeting

27. The members voting as set out above voted and were directed by the underlying beneficial owners to so vote, with the benefit of the (very) full information contained in the Proxy Statement. Counsel reminded me that, strictly speaking, I am not concerned with beneficial ownership of shares but I take comfort from the reality that by value a very large proportion of those economically interested in the shares gave instructions to vote and to vote in favour of the Scheme at the Court meeting and on the resolutions at the General Meeting.

28. There were no connectivity problems during the Court and other meetings and the Court can be satisfied that appropriate arrangements were maintained to enable the shareholders to consult together, so far as they wished, so as to satisfy the notion of a deliberative

assembly in the manner suggested by Trower J in *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) at [43].

29. There is nothing to suggest that any person voting in favour of the Scheme at the court meeting was promoting interests adverse to those of the class concerned.

Whether the Scheme is a fair scheme which a member of the class might reasonably approve

30. The proposals give effect to the commercial transaction. The Scheme's terms are set out fully in the Proxy Statement. The commercial background to the proposed transaction is fully explained in the materials made available. Accordingly, I consider the Scheme is plainly one an intelligent and honest man might reasonably approve.

Whether there is any blot/defect in the Scheme

31. I have not, on the evidence before me, identified any matter that would render the scheme unlawful or inoperative such as to represent a blot or defect in the scheme.

Other Matters

32. In terms of other matters, Mr Moore drew my attention to two points.

33. The first concerned certain share options awarded by the Company under various employee share plans. Broadly speaking, options or rights over the Company's equity will be replaced by options or rights over Topco's equity on the same terms (subject to necessary adjustments to reflect the fact of the Combination).

34. The second concerned the remuneration or compensation packages of five of the Company's executive officers and directors. One aspect of those arrangements (a golden parachute) was required to be the subject of a non-binding advisory vote at the general meeting held on 16th May 2022. As appears from the announcement of 20th May 2022 the resolution was passed by a very substantial majority.

35. Since, in aggregate, the five affected persons had interests in only 0.71% of the Scheme Shares, I agree with Counsel that there can be no suggestion that the approval of the Scheme hinged upon the votes of persons entitled to benefit from the compensation arrangements.

36. None of these matters give rise to any concerns as to my discretion to sanction the Scheme.

37. Finally, I record that Mr Moore is authorised to give the undertakings on behalf of Topco and Quidel which are set out in Recital I to the Scheme.

Conclusion

38. In conclusion, on the basis of the matters I have set out, and on the basis of the undertakings I have just mentioned, I consider it is appropriate to sanction this scheme. I will make an Order in terms of the draft presented to me.