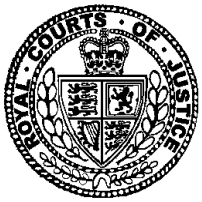

Neutral Citation Number: [2022] EWHC 1646 (Ch)
Case No: CR-2022-001793

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL
30 June 2020

BEFORE:

MR JUSTICE MEADE

IN THE MATTER OF NOSTRUM OIL & GAS PLC ("the Company")

AND IN THE MATTER OF THE COMPANIES ACT 2006

DAVID ALLISON QC and RYAN PERKINS instructed by **White & Case LLP** appeared on behalf of the Company

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JUDGMENT

Hearing date: 20 June 2022

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. This Judgment was handed down remotely by email circulation to the parties' representatives and release to the National Archives. Deemed date for hand-down: 30 June 2022.

Mr Justice Meade:

Introduction

1. On 20 June 2022 I heard an application by Nostrum Oil & Gas plc ("the Company") to convene a single meeting of certain of its creditors ("the Scheme Creditors") for the purpose of considering and, if thought fit, approving a scheme ("the Scheme") of arrangement under Part 26 of the Companies Act 2006 ("CA 2006").

2. The Scheme relates to two series of unsecured notes ("the Existing Notes"), with aggregate principal amount of approximately US$1.125 billion.

3. At the hearing, I made an Order convening a meeting with other directions relating to it, in substantially the form sought by the Company. I said I would give written reasons, and this judgment contains them. This judgment draws extensively on the Company's very helpful skeleton argument in describing the facts and background.

4. The Company was incorporated in England and Wales in 2013. Its shares are listed on the Main Market of the London Stock Exchange. It is the ultimate parent of a corporate group ("the Group") which operates an oil and gas business in Kazakhstan. The largest shareholder of the Company is ICU Holdings Limited ("ICU").

5. The key operating company within the Group is an entity called Zhaikmunai LLP ("Zhaikmunai"). Zhaikmunai holds a licence in relation to an oil and gas field in Kazakhstan ("the Chinarevskoye Field"), granted by the Ministry of Energy of the Republic of Kazakhstan.

6. The Chinarevskoye Field is currently the Group's sole source of revenue, but production has been falling since 2017 and is expected to continue to fall as reservoirs are depleted. As a result of several write-downs of the Group's reserves, it has emerged that the Group is seriously over-leveraged and restructuring is needed.

7. The Company's main indebtedness arises from the Existing Notes, which comprise two series of notes: (i) the "2022 Notes", which were issued in July 2017 and are due

to be repaid in full on 25 July 2022; and (ii) the "2025 Notes", which were issued in February 2018. The 2022 Notes pay a coupon of 8% per annum and have an aggregate principal amount of US$725 million. The 2025 Notes pay a coupon of 7% per annum and have an aggregate principal amount of US$400 million.

8. The Existing Notes are unsecured and are guaranteed by various companies within the Group ("the Guarantors"). They are listed on the Irish Stock Exchange.

9. The Group failed to make interest payments under the Existing Notes in July 2020, did not remedy the failure within the permitted period, and has paid no interest since. I give further details of this below.

Proposed scheme

10. The Existing Notes are issued in the form of a "Global Note": a single global note is issued for the entire face value of each series, and beneficial interests in each Global Note are traded through the Depository Trust Company ("the Clearing System"). The participants in the Clearing System maintain book-entry accounts to which interests in the Existing Notes are credited. The "Noteholders" are the holders of such book-entry interests in the Existing Notes. As the Noteholders are entitled to call for the issuance of "Definitive Notes" in certain circumstances under the Existing Indentures, they are deemed to be contingent creditors for the sums due under the Existing Notes and are therefore treated as Scheme Creditors to ensure that the persons with the relevant economic interest are enfranchised when voting on the proposed scheme.

11. The principal purpose of the Scheme is to allow for the implementation of a comprehensive financial restructuring of the Group ("the Restructuring"). It is worth briefly setting out the development of the Restructuring:

    a. Since May 2020, the Group has been engaged in discussions concerning the potential terms of the proposed scheme with an ad hoc group of Existing Noteholders (“the AHG”) and with ICU.

b. On 24 July 2020, the Group failed to pay interest due under the Existing Notes and did not remedy the default within the 30-day grace period. No further interest has been paid on the Existing Notes since that date, resulting in a series of defaults under the Existing Notes.

c. On 23 October 2020 various Group companies entered into a temporary forbearance agreement with the members of the AHG. A further agreement was entered into on 19 May 2021, which was extended on several occasions. On 23 December 2021, an agreement in principle was reached as to the terms of the Restructuring, and a lock-up agreement was executed ("the Lock-Up Agreement"). The Lock-Up Agreement has now been signed by Noteholders representing approximately 77.7% of the aggregate principal amount of the Existing Notes.

d. On 29 April 2022, the Restructuring was approved by a special resolution of the Company's shareholders.

12. The immediate effect of the Scheme will be to impose a moratorium on any enforcement action by the Noteholders to allow the Company to implement the Restructuring by obtaining certain regulatory approvals (which I deal with below). The moratorium is intended to remain in place until the date when the Restructuring is completed, or until a long-stop date of 16 December 2022. There is also a mechanism whereby a majority in value of the Scheme Creditors can terminate the moratorium and indeed the Scheme.

13. There are certain regulatory approvals that the Company must obtain in order to implement the Restructuring, which arise due to certain of the Scheme Creditors being direct or indirect targets of sanctions in the UK, EU or US. Such Scheme Creditors ("the Sanctions Disqualified Persons") are currently prohibited from dealing with the Existing Notes. Approximately 7.1% by value of the Notes are held by Sanctions Disqualified Persons.

14. The Restructuring may require licences to be granted by the sanctions authorities in the UK, the Netherlands and the US. I understand from Mr Allison QC, who

appeared for the Company, that there is a possibility that the relevant authorities will indicate that no such licence is required (although this is less likely with the US). There is uncertainty as to when such licences (or confirmation that licences are not required) will be provided, which is why the moratorium is necessary to provide the Company with breathing room to implement the Restructuring.

15. The key commercial terms of the Scheme are as follows:

a. First, all Scheme Creditors will be entitled to receive a *pro rata* allocation of two series of newly issued notes governed by English law, comprising:

i. US$250 million of new senior secured notes, which will bear 5% interest (to be paid in cash) and will mature on 30 June 2026. These new senior secured notes will benefit from first-ranking security over all the Group's assets and will be guaranteed by the Guarantors; and

ii. US$300 million of new senior unsecured notes, which will bear 1% interest (to be paid in cash), plus 13% (to be paid in kind by being capitalised and added to the principal) and will mature on 30 June 2026. These new senior unsecured notes will benefit from second-ranking security interests over certain bank accounts of the Group, but will otherwise be unsecured. They will, however, benefit from guarantees provided by the Guarantors, and will be capable of being repaid through the issuance of new shares in the Company.

b. Second, all Scheme Creditors will be entitled to receive a *pro rata* allocation of new shares in the Company representing 88.89% of the equity on a fully-diluted basis.

c. Third, the holders of the new senior unsecured notes will be entitled to receive the benefit of a *pro rata* allocation of additional share warrants ("the New Warrants") issued by the Company to a trustee on their behalf. Upon the exercise of the New Warrants, the holders of the new senior unsecured notes would increase their holding of the enlarged issued share capital of the Company to 90%.

16. Under the Scheme, the Scheme Creditors are expected to recover between 29.4% to 40.0% of the amounts presently due under the Existing Notes. An analysis carried out by Grant Thornton on the likely returns to the Scheme Creditors in formal insolvency proceedings ("the Scheme Comparator Report") identifies two possible scenarios:

    a. The first scenario, a planned insolvency, is where the insolvency proceedings are proceeded by a reasonable period of time to allow for contingency planning and an orderly entry into insolvency proceedings. The Scheme Comparator Report shows that the likely recoveries for the Scheme Creditors in a planned insolvency would be equal to 16% of the sums outstanding under the Existing Notes.

    b. The second scenario, an unplanned insolvency, would involve a disorderly collapse of the business and a piecemeal liquidation. In this scenario the likely recoveries would be approximately 10.6%.

17. I am satisfied that this is an appropriate and credible comparison: insolvency in the absence of the Scheme must be a strong possibility given the history related above and in particular non-payment under the Existing Notes and the forbearance arrangements. Whether the evidence is convincing that, whether planned or unplanned, insolvency would produce a significantly worse result that the Scheme.

18. The Scheme will operate to discharge all claims of the Scheme Creditors under the Existing Notes against all of the obligors within the Group. I am satisfied that it is a well-established principle that a scheme can compromise a creditor's claim against a third party where such compromise is "*necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors*", e.g. to avoid a “ricochet” claim which might defeat the purpose of the Scheme (see *Re Lehman Brothers International (Europe) (No 2)* [2010] Bus LR 489 at [65], and *Re Noble Group Ltd* [2019] BCC 349 at [24]).

19. The Scheme will authorise the Company to execute a Deed of Release providing *inter alia* a customary release of the professional advisors to the Group, the directors of various Group companies and other persons involved in the Scheme / Restructuring

from any liability arising from its negotiation or implementation. Again, I am satisfied that this kind of provision is common in these cases.

Function of the court

20. It is well established in the relevant authorities that the function of the Court at a scheme convening hearing is not to consider the merits or the fairness of a proposed scheme. Such questions will arise, if necessary, for consideration at the sanctions hearing if the scheme is approved by the statutory majority (see *Re Telewest Communications plc* [2004] BCC 342 at [14]). Rather the court is required to give directions for the convening of scheme meetings and, if so, what those directions should be.

21. The procedure for a scheme convening hearing under Part 26 CA 2006 is governed by the Practice Statement issued by the Chancellor on 26 June 2020 ("the Practice Statement"). The issues for consideration at this stage are, in essence: First, any issues which may arise as to the constitution of meetings of creditors. Secondly, any issues as to the existence of the Court's jurisdiction to sanction the scheme. Thirdly, any other issue (not going to the merits or fairness of the scheme) which might lead the Court to refuse to sanction it.

22. I should say at this stage that this application does not appear to be overly complex in nature and does not raise any new point of law or practice, save for the point relating to sanctioned creditors which I deal with below. I will therefore state my reasons relatively briefly.

Notice of the convening hearing

23. The Practice Statement also provides that, unless there are good reasons for not doing so, the applicant should take all steps reasonably open to it to notify persons affected by the scheme that the scheme is being promoted, the purpose which the scheme is designed to achieve and its effect, the meetings of creditors which the applicant considers will be required and their composition, together with a number of identified matters relating to the logistics for the proposed meeting.

24. In the present case, the Practice Statement Letter, being the document notifying the Scheme Creditors, was issued on 11 May 2022 and circulated to the Scheme Creditors through the Clearing System, which I accept is the standard method of notifying noteholders of a convening hearing. The Scheme Creditors have therefore had just under six weeks' notice of the convening hearing.

25. The question of the timing of the notice to Scheme Creditors has been considered in a number of cases, the details of which I will not recite. Suffice to say the appropriate period of notice is a fact-sensitive matter. Norris J helpfully identified three relevant factors at [22] of *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch): (i) the complexity of the scheme; (ii) the degree of consultation with creditors prior to the launch of the scheme; and (iii) the urgency of the scheme having regard to the financial distress of the company.

26. In this case, I am satisfied that adequate notice has been given, taking into account in particular the following matters:

    a. The Scheme Creditors have been aware of the key commercial terms of the Restructuring for several months, and indeed the Lock-Up Agreement has been available since late December 2021.

    b. The Scheme is relatively urgent, having regard to the approaching "debt wall" that falls due upon the maturity of the 2022 Notes on 25 July 2022

    c. No Scheme Creditors appeared before me at the hearing to make submissions on the relief that should be granted or to complain that they had not been given sufficient time to prepare to do so.

    d. In any event, and in my opinion on any view, six weeks' notice is amply sufficient.

<u>Class composition</u>

27. The next matter for consideration relates to questions of class composition. The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see *Sovereign Life Assurance v Dodd* [1892] 2 QB at [573] and many cases since, including e.g. *Re Telewest Communications Plc* [2004] BCC 342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority.

28. In the present case, the Company submits that the Scheme Creditors should vote in a single class, and that to its understanding no Scheme Creditor contends to the contrary. In support of this submission the Company notes that in a formal insolvency proceeding, the Scheme Creditors would have the same legal rights against the Company. In particular, the Scheme Creditors would all have unsecured claims ranking *pari passu*. Their legal rights would be identical, and they would receive the same ratable return. Under the Scheme, the Scheme Creditors will receive the same commercial deal, and they will be affected by the initial moratorium in the same way. Once the Restructuring is implemented, each Scheme Creditor will be entitled to receive the same package of consideration *pro rata* to their existing claims. I accept this, generally and in the light of my analysis of the points of detail which follows.

29. Mr Allison raised five matters in this regard which in his submission do not present a class issue but should nevertheless be considered by the court.

30. First, the Existing Notes fall into two series (the 2022 Notes and the 2025 Notes) with slightly different interest rates (8% versus 7%) and different maturities (July 2022 versus February 2025). Mr Allison referred me to numerous cases in which the court has held that interest rate and maturity differences do not fracture the class in the context of a scheme where the comparator is a formal insolvency proceeding.

31. I am satisfied that these differences are immaterial for the purposes of the test to be applied.

32. Second, a small consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 14 January 2022 ("the Lock-Up Fee"). The Lock-Up Fee is a sum equal to 0.5% of the principal amount of the aggregate principal amount of the relevant Noteholder's Existing Notes. The Lock-Up Fee will be payable in cash upon the successful implementation of the Restructuring.

33. Consent fees of this type are very common, although there are two strands of authorities which govern how they dealt with. Some authorities suggest that, so long as a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. That is the case on these facts. Other authorities suggest that even if a consent fee is made available to all, it is necessary to consider whether the quantum is material. If a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions, then the fee does not fracture the class: see *Re Primacom Holding GmbH* [2013] BCC 201 at [57]. Mr Allison submits that there is no basis for concluding that the Lock-Up Fee (which represents 0.5% of the Existing Notes held by the Relevant Scheme) would exert a material influence on the Scheme Creditors' voting decisions.

34. I accept Mr Allison's submissions on this point, and I agree that the quantum of the Lock-Up Fee is sufficiently modest so as not to fracture the class. So the Scheme is acceptable on both strands of authorities.

35. I should note that the Company has also agreed to pay the fees of the legal and financial advisers of the AHG and the ICU, in connection with the implementation of the Restructuring. It is well established in the authorities that such payments also do not fracture the class.

36. Third, under the Scheme holders of 15% or more of the new senior unsecured notes are entitled to nominate a director to be appointed to the board of the Company. Mr Allison argues that these entitlements do not fracture the class because (i) all Scheme Creditors will be entitled to receive new senior unsecured notes on a *pro rata* basis;

(ii) the board nomination rights are just a function of the size of certain Noteholders' shareholdings, rather than a reflection of different rights enjoyed by different Noteholders; and (iii) in any event the board nomination rights are not so material as to fracture the class because the directors of the Company have a fiduciary duty to act in the best interests of the Company and its stakeholders, not just the individuals by whom they were appointed.

37. I was helpfully referred, in oral submissions, to Warren J's decision in *Re Hibu Group Limited* [2016] EWHC 1921 (Ch) which dealt with a similar issue and similar board nomination rights. At [56] Warren J notes that despite these nomination rights: "*all the shares are identical in that they carry the same rights. To conclude that this potential divergence of interests should lead to separate classes would lead to precisely the sort of proliferation of classes which the courts have cautioned against*". This suggest that the ability to nominate is only an interest, and not a right as such, but in the present case I do not think it necessary for me to decide one way or another, as even if they were deemed to be rights and not interests, I am satisfied that on the facts before me such provisions do not fracture the class. That is because I am satisfied that the ability to nominate is not sufficiently significant, and because of the fiduciary duty point: see *Re Pizza Express Financing 2 Ltd* [2020] EWHC 2873 (Ch) at [44] (Sir Alastair Norris) and *Re Swissport Fuelling Ltd* [2020] EWHC 3064 (Ch) at [71] (Trower J).

38. Fourth, some Noteholders, including ICU, are also shareholders in the Company, which means in practice that certain Noteholders have different interests at different levels of the Company's capital structure. I am satisfied that the authorities clearly state such "cross-holdings" do not fracture the class.

39. Fifth, the Sanctions Disqualified Persons will not be able to receive any consideration under the Scheme whilst they continue to be sanctioned. The consideration allocated to such individuals will be held for them on bare trust ("the Holding Period Trust"). If and when such individuals cease to be sanctioned, they will have 60 days from that date to claim the consideration from the Holding Period Trust.

40. Mr Allison submits that this structure does not fracture the class. It is common for a noteholder to be unable to receive the scheme consideration and so it is equally common for noteholder schemes to include some form of holding trust in which the scheme consideration can be held until such time as the relevant noteholder can lawfully receive it. As pointed out by Marcus Smith J in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch), there is a fundamental distinction between a scheme conferring different rights on different groups of creditors a scheme conferring the same rights on all creditors with but some creditors are unable to enjoy those rights by virtue of some personal characteristic that they possess. The latter situation should not fracture the class, as it involves a difference in interests rather than rights.

41. I accept Mr Allison's submissions that in this case the Sanctions Disqualified Persons are having their *pro rata* entitlement preserved and are not being left out; indeed they are being treated in the same manner as individuals who fail to provide evidence of their shareholdings in time.

42. Sanctions Disqualified Persons will not, because of their status as such, be able to vote on the Scheme. I note however that the (current) Sanctions Disqualified Persons signed up to the Lock-Up Agreement prior to their being sanctioned and this strongly indicates that they did not object to the Scheme and would be unlikely to do so now.

43. In any event, in my opinion the issue of sanctions relates, if anything, to the fairness of the Scheme, which is not a question I need to decide at this stage. I therefore agree with Mr Allison that the fact that there are Sanctions Disqualified Persons, and the mechanisms put in place to deal with sanctions, do not fracture the class. For completeness, I record that I slightly misunderstood the voting position in relation to Sanctions Disqualified Persons at the hearing because I was at cross-purposes with Mr Allison. The paragraphs above have been corrected following a helpful communication from the Company's Counsel after seeing my judgment. I am confident that my misunderstanding did not affect the result and I would have announced the same decision at the hearing anyway.

44. Accordingly, I am satisfied that it is appropriate to convene a meeting of a single class of Scheme Creditors.

Jurisdiction

45. Turning to questions of jurisdiction, there is no doubt that the Company is a company as defined in section 895(2)(b) of CA 2006. It is incorporated in England and Wales and is therefore liable to be wound up under the Insolvency Act 1986. Secondly, I am satisfied that the scheme is capable of being characterised as a compromise or arrangement between the Company and the Scheme Creditors within the meaning of section 895(1) of CA 2006.

46. It is relevant here to consider the fact that the Existing Notes were originally issued by the Dutch company Nostrum Oil & Gas Finance B.N. ("the Dutch Co-Issuer") and were originally governed by New York law. The Group obtained consent from the Noteholders on 2 February 2022 to:

    a. Cause the Company to accede to the Existing Indentures as a co-issuer of the Existing Notes (such that the Company and the Dutch Co-Issuer would be jointly and severally liable as primary obligors);

    b. Amend the governing law provisions of the Existing Indentures so that the Existing Notes would be governed by English law rather than New York law; and

    c. Amend the jurisdiction provisions of the Existing Indentures so as to confer exclusive jurisdiction on the English Court in relation to any proceedings commenced by an obligor of the Existing Notes and to confer non-exclusive jurisdiction on the English Court in relation to any proceedings commenced by the Noteholders.

47. Two supplemental indentures were executed to give effect to the above amendments. As a result, the Existing Notes are now governed by English law and are subject to the jurisdiction of the English Court, and the Company is now a co-issuer of the Existing Notes.

48. For good order I have considered whether the fact that the Company became a party to the Existing Notes specifically for the purpose of enabling a scheme of

arrangement detracts from the conclusion that the court has jurisdiction to sanction a scheme between this Company and the Scheme Creditors. I am satisfied that it does not. The authorities clearly establish that it is permissible to take steps which are intended to confer jurisdiction on the English Court, and indeed similar steps have been taken in a number of recent schemes (see Marcus Smith J at [56]-[57] in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch)).

49. I am therefore satisfied that there are no jurisdictional impediments in this case.

50. Finally, I note that the Company has also asked the court to grant a declaration that Mr Khan has been validly appointed by the Company to act as its foreign representative for the purposes of applying for the recognition of the Scheme in the US under Chapter 15 of the US Bankruptcy Code. I agreed that this declaration should form part of the recitals of the Order at the hearing before me.

Directions for convening the scheme meeting

51. I was taken through the Order by Mr Allison and am satisfied that the proposed directions for convening the scheme meeting are appropriate. We discussed various minor changes that need to be made to the order, most notably the second to last recital which relates to the need for an OFAC Licence. As put before me, the recital did not account for a situation in which the Company is informed by the relevant US authorities that an OFAC Licence is not required, and so depending on the view of the Company's US counsel needs to be amended. In addition, the Order needs to be amended to take account of the possibility that the scheme meeting may be delayed on account of obtaining the licences and/or confirmations from the relevant authorities.

Conclusion

52. For the above reasons I will make the convening Order as sought, with the minor modifications indicated.