Case No: CR-2022-004294

Neutral Citation Number: [2022] EWHC 3496 (Ch)

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Wednesday, 7 December 2022

BEFORE:

**MR JUSTICE MICHAEL GREEN**

---

**IN THE MATTER OF CFLD (CAYMAN) INVESTMENT LIMITED**

---

**MR T SMITH KC** and **MR M ABRAHAM** appeared on behalf of the Applicant

---

**JUDGMENT**
(Approved)

---

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. MR JUSTICE MICHAEL GREEN: This is the convening hearing in relation to a proposed Scheme of Arrangement ("the Scheme") proposed by the company CFLD (Cayman) Investment Limited ("the Company") pursuant to Part 26 of the Companies Act 2006. Mr Tom Smith KC appears with Mr Matthew Abraham on behalf of the Company and has made helpful submissions both in writing and orally.

2. I have read the evidence in support of the application being the witness statements of Ms Yawei Xu the Finance Director of the Company's parent in China, a witness statement of Ms Yanli Hu, Secretary of the parent company and a witness statement of Ms Katerina Papamichael, a Director of the Information Agent for the Company, about voting mechanics and distribution of documentation and notices to Scheme creditors. I have also read the Explanatory Statement, Practice Statement Letter and Supplemental Practice Statement Letter and the Scheme itself.

3. The Company is part of the China Fortune Land Development Group. It seeks an order convening a single meeting of Scheme creditors to consider and, if thought fit, to approve the Scheme. The Group which is predominantly based in the People's Republic of China ("PRC") is facing a situation of tightening liquidity and its operation and financing have been adversely impacted by the credit environment and the consequences of the pandemic. This Scheme is part of a wider restructuring of the Group's financial debts. The intended effect of the Scheme is to address liquidity issues arising from the Group's offshore debt which is held by the Company. The Company is incorporated in the Cayman Islands.

4. The offshore debt consists of 11 tranches of unsecured US dollar-denominated bonds issued by the Company which are governed by English law. The existing bonds are guaranteed by China Fortune and Development Company Limited, a publicly traded real estate developer incorporated in the PRC and the parent of the Group. The funds are on-lent by the Company to other Group entities to fund the Group's operations. The Scheme creditors whose claims are to be affected by the Scheme are the holders of the beneficial interest in the existing bonds. There has already been a restructuring of the Group's onshore debt, and this has been a necessary next stage in the overall restructuring to avoid a damaging liquidation which is likely if the Scheme is not approved.

5. The broad structure of the Scheme is as follows. The Company's liabilities under the existing bonds are to be restructured so that first, the Scheme creditors release their existing claims under and in connection with the existing bonds in return for receiving or being entitled to receive the restructuring consideration which will comprise certain allocations of new bonds released by the Company. Secondly, the Company will pay a cash prepayment fee to certain Scheme creditors on the terms and conditions set out in a Restructuring Support Agreement ("RSA") entered into by the Company and its parent, dated 16 September 2022 as amended and restated on 24 November 2022. Where a Scheme creditor receives a cash prepayment fee it will form part of the restructuring consideration for that Scheme creditor and there will be a corresponding reduction in the principal amount of one of the new bonds that the Scheme creditor is entitled to receive.

6. The Company proposes to hold a single meeting for the Scheme creditors on the basis that the existing rights of the Bond holders and their proposed treatment under the Scheme are not so dissimilar that it is impossible for them to consult together with a view to their common interest. 83 per cent of Bond holders by value have indicated support for the Scheme and have thereby become entitled to the cash prepayment fee. However, without the unanimous consent of all the Scheme creditors the restructuring could not be effected on a consensual basis and it is therefore necessary to proceed with the Scheme. The Company has not received any notice that any Scheme creditor intends to attend this hearing or otherwise make submissions to the court, and no-one has appeared before me today.

7. The background is fully set out in the supporting evidence, and I do not need to set it out here. The Group has a very substantial property business in the PRC involved with the development of new industrial cities, urban real estate development and other property services. It is currently balance sheet solvent but is facing severe liquidity problems affecting its ability to finance its debt in the short term. Its financial liabilities are split between onshore and offshore liabilities. The existing bonds that comprise the offshore debt are 16.5 per cent of the Group's overall debt. As I say, these were provided in 11 tranches with maturities dating from February 2021 to January 2025. The existing bonds are governed by English law and would rank **pari**

**passu** as unsecured claims if the Company was wound up. They are guaranteed by the parent, but they are otherwise unsecured.

8. Following the onset of these significant liquidity issues, the Group sought to implement a restructuring plan for its onshore and offshore debt. The plan in relation to onshore creditors was launched on 30 September 2021. Following approval of the plan and 68 per cent, as I understand it, of the onshore creditors signing up to it, this restructuring of the offshore debt was announced on 16 September 2022. In that time certain of the existing bonds had fallen due and the Company is in default of 8 tranches of the existing bonds. This could trigger cross-defaults in relation to the other bonds.

9. The Company has been engaging with the Bond holders during the course of this year and in particular with a group represented by Latham and Watkins LLP. This has led to certain improvements and modifications to the Scheme increasing the cash prepayment fee to 2.8 per cent and extending the deadline to sign up to the RSA, and so be entitled to the cash prepayment fee, ultimately to the 1 December 2022. By that date the group represented by Latham and Watkins signed up to the Scheme and that has meant that there is now some 83 per cent of the Scheme creditors committed to vote in favour of the Scheme.

10. A further important point is that the Company has agreed to pay a portion of the Latham and Watkins group's adviser's fees in the sum of $2.5 million whether or not the Scheme completes. That is a sum that is less than 0.05 per cent of the total value of the restructuring consideration.

11. As explained in Ms Shu's witness statement, if the Scheme is not approved the Company is likely to be wound up in the Cayman Islands. This will mean that the parent company would is liable under the guarantees and it would trigger cross-defaults across the Group in the PRC which will likely result in a consolidated Group liquidation in the PRC. EY prepared a liquidation analysis which calculated that Scheme creditors would recover between 8 per cent and 14.4 per cent in a liquidation whereas the Scheme would give a nominal recovery rate to Bond holders of 89.2 per cent with net present values ranging from 54.4 per cent to 85.3 per cent depending on discount factors and the actual options selected by Bond holders.

12. So in summary, the Scheme provides for the cancellation of the existing bonds, the release of the Company, the guarantor, the existing bonds trustee, the existing bonds agent and the existing bonds depository from their liabilities towards one another under the existing finance documents. In exchange for that the Scheme creditors will be entitled to receive a new suite of bonds. There are three different types of bonds and creditors have options for the make up of the replacement bonds that they wish to take.

13. Following the announcement of the proposed Scheme, the Company has become aware that certain Bond holders are likely to be affected by the financial sanctions imposed on Russia as a result of the war in Ukraine. In particular, the sanctions have a practical effect on the Scheme creditors whose existing bonds are held through Russia's National Settlement Depository or other sanctioned banks or depositories or who are otherwise unable to submit instructions or settle through the clearing systems as a result of the sanctions. These have been called, in the Scheme, the blocked Scheme creditors. As explained in the witness statements, the Company will determine which of the Scheme creditors are blocked Scheme creditors using the information provided to it by the relevant Scheme creditors in response to the solicitation package. Blocked Scheme creditors will be beneficially entitled to the restructuring consideration. This will be held on trust by the Company for them until either the sanctions are lifted or the expiry of a 21 year perpetuity period, whichever is the earlier.

14. The detailed terms of the Scheme are set out in the evidence of the Explanatory Statement, and it is unnecessary for me to set them out in this judgment as this is a convening hearing where the merits and fairness of the Scheme are not being considered. That is for the sanction hearing.

15. From section 896(1) of the Companies Act 2006 the following matters fall to be considered at this convening stage.

    (1) First, notification of the hearing for interested parties.

    (2) Second, the identity of the Scheme creditors.

(3) Thirdly, the classes of creditors proposed by the Company and that is the principal matter.

(4) Fourthly, the jurisdiction and sanction of the Scheme in respect of the Company.

(5) Fifth, the notice, timing and conduct of the Scheme meeting.

(6) Sixth, the requisite documentation.

16. As to the notification of this hearing the Company has complied with the Practice Statement by notifying persons affected by the Scheme in sufficient time. The Practice Statement Letter was sent on 16 November to all Scheme creditors and that was 21 days prior to this hearing. The Supplemental Practice Statement Letter was sent on 24 November reflecting the increase in the cash prepayment fee. That was 14 days prior to this hearing. In both cases care was taken to ensure that the correct channels for distribution were used in order to reach Bond holders, and this has been discussed in Ms Papamichael's witness statement. Those notice periods are within what is customary in similar schemes and in any event the Scheme does not give rise to complex class issues such that extensive notice would have been required. Nor does the Company consider that there are any creditor issues which would prevent the summoning of a single class of the Scheme creditors or that there are any other matters which relate to jurisdiction which are necessary or suitable for resolution at this stage. As I have already said, no Scheme creditor has actually raised any creditor issues in relation to the Scheme which require a resolution at this stage.

17. Turning to the second matter, the identity of Scheme creditors. The Bond holders are creditors within Part 26 of the Act which includes contingent creditors. (See *Re T & N Limited* [2006] 1 WLR 1728, a decision of David Richards J, as he then was.) The Bond holders do not own their own certificates. Rather, they are held in registered global form as registered global certificates which Bond holders are entitled to have registered in their names and it is now the established practice to treat such

Bond holders as contingent creditors. That practice has been followed on a large number of occasions.

18. Turning to the main matter as to the single class meeting that is proposed by the Company, 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."

That is from *Sovereign Life Assurance v Dodd* [1892] 2 QB 573. It has been repeated on many occasions.

19. Following what Hildyard J said in the *Re Apcoa Parking Holdings GmbH* [2015] BUS LR 374, it is necessary to consider both the existing rights of creditors and the rights conferred on the creditors by the scheme itself. Importantly, the court is focused for these purposes on the rights against the scheme company and not the commercial interests. The court takes a broad approach and should ensure that any unnecessary veto is not given to a minority group. A difference justifying a separate class must be material and substantive.

20. In relation to this case Mr Smith has pointed to the following principles.

(1) First, differences in the maturity dates of a debt prior to the Scheme becoming effective do not give rise to class issues and splitting of classes. In circumstances where a formal insolvency process would take place without the Scheme there would be acceleration of the debts and the debts would rank **pari passu**. (2) Secondly, minor differences in interest rates between the Scheme creditors are unlikely to result in a separate class and he referred to *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 where a spread between 4.25 per cent and 2.25 per cent was not significant enough to warrant separate classes.(3) Thirdly, lock up or consent fees will not fracture a class in circumstances where (1) they are open to all Scheme creditors in exchange for early support and (2) are not material. And there is authority in relation to that.

(4) Finally, the courts have held that worker adviser fees paid to some members of a class but not all do not fracture a class where:

> "This is limited to reimbursing the members of the committee for the disbursements actually incurred by them and since they are payable in any event and not dependent upon sanction of the scheme."

That is a quote from *Re Lecta Paper UK Limited* 2019 EWHC 3615 (Ch).

21. Applying those principles to this case, Mr Smith submitted that it is appropriate for the Scheme creditors to vote in a single class and that the court should so order. In particular he said, firstly, the Bond holders have materially the same existing rights against the Company. In assessing the rights of the Scheme creditors as against the Company going into the Scheme, the relevant comparator is the rights those Scheme creditors would have in a liquidation of the Company and all the Scheme creditors would rank **pari passu** as between themselves as unsecured claims in such a liquidation. The fact that the existing bonds have differences in coupon and maturity rates does not give rise to a difference of rights.

22. Secondly, as to the rights of the Scheme creditors conferred by the Scheme, firstly, the Bond holders' rights will be compromised in the same way as between themselves through the allocation of the new bond. Secondly, although Bond holders may end up with different allocations of the new bond they are all given the same rights to elect their allocations and any difference in allocations is a consequence of the way in which they decide to exercise those rights in their own commercial interests. Thirdly, the cash prepayment fee does not fracture the class in circumstances where (1) unlike a consent fee the cash prepayment fee is not an additional sum of money paid on top of the restructuring consideration but is instead a genuine prepayment, such that the Scheme creditor's entitlement to the new bond was reduced up to the value of that Scheme creditor's cash prepayment fee entitlement; (2) it is not material whether compared to the difference between the likely return to Scheme creditors under the Scheme and the expected return in a consolidated liquidation of the Group in the PRC, that I said was 8 per cent to 14.4 per cent, and that being the relevant alternative should

the Scheme not proceed; (3) the cash prepayment fee was offered to all Scheme creditors and all Scheme creditors were given an equal opportunity to participate in it.

23. The third point relates to the adviser fees and that does not fracture the class in these circumstances where the payment reflects the reimbursement of fees actually incurred by the Group seeking advice and so it does not confer any net benefit or bounty on those creditors, that it is payable in any event and is not dependent upon the sanction of the Scheme, and the fees are not sufficiently material to fracture the class where they represent less than 0.05 per cent of the total value of restructuring consideration.

24. The final point relates to the blocked Scheme creditors. The fact that a blocked Scheme creditor will not be able to receive any consideration under the Scheme whilst they continue to be affected by the sanctions does not fracture the class or create a new class for blocked Scheme creditors. The blocked Scheme creditors have their pro rata entitlement to the restructuring consideration preserved. They are not being left out in any way. They are in the same position as Scheme creditors who have failed to provide evidence of their holding in time and the approach taken to blocked Scheme creditors is consistent with that taken by Meade J in the case of *Re Nostrum Oil and Gas Plc* [2022] EWHC 1646.

25. So in all the circumstances, I am satisfied that there is more to unite the class than divide them and so there is no need to create any further classes to meet together to consider the Scheme.

26. In relation to jurisdiction, I am satisfied that this is a compromise or arrangement within section 895(1)(a) of the Companies Act 2006. There may be an issue as to whether the Company is a company within the meaning of the Companies Act which is defined as a company liable to be wound under the Insolvency Act 1986. As an unregistered company it is liable to be wound up under Part 5 of the Insolvency Act 1986 and it may ultimately depend on whether there is a sufficient connection with England by reference to the fact that the existing bonds are governed by English law, but I do not need to decide that question now. At this stage the approach of the court is to defer issues regarding whether the court should exercise jurisdiction to the sanction hearing unless there is jurisdictional roadblock that we

determine now. I do not think there is. Furthermore, the sanction order will take effect in the Cayman Islands which is where the Company is incorporated.

27. As to the directions, timing and conduct of the meeting, these have been set out in the draft order as explained principally by Ms Papamichael and I have gone through the draft order with Mr Smith. It is proposed that the meeting be convened for 12 January 2023 commencing at 10.00 am UK time, being 6.00 pm Hong Kong time, and for there to be a live video conference link to the offices of Sidley Austin in London. The Company has set up an alternative voting system for the blocked Scheme creditors. Pursuant to that mechanism the blocked Scheme creditors who are not directly sanctioned, that is those who are not personally designated persons under the sanctions but are otherwise impeded from voting under the general voting mechanism of the Scheme creditors, will be able to vote. The position is not the same for blocked Scheme creditors who are personally subject to the sanctions as designated persons, to the extent that there are any such persons -- and the Company is not presently aware that there are -- those blocked Scheme creditors will not be entitled to vote because to do so would be in breach of the sanctions. However, as I said, the Company is not aware that there are any Scheme creditors who fall into that category.

28. Finally, as to the documentation, I have considered the adequacy of the Explanatory Statement in accordance with the Practice Statement, and it communicates all material matters in a way that is comprehensible to its intended addressees who are all assumed to be sophisticated investors and I am therefore happy for it to go out in that form.

29. In conclusion, I therefore convene a single Scheme meeting to vote on whether to approve the Scheme and make the order in the terms that were provided to me in that respect.

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

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk

**This transcript has been approved by the Judge**