Neutral Citation Number: [2023] EWHC 415 (Ch)

Case No: CR-2023-000936

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

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

Date: 27/02/2023

Before :

SIR ANTHONY MANN

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IN THE MATTER OF AGPS BONDCO PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

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David Allison KC, Ryan Perkins and Annabelle Wang (instructed by **White & Case LLP**) for the **Company**
Tom Smith KC and Adam Al-Attar (instructed by **Akin Gump**) for an **Ad Hoc Group of Opposing Creditors**
Felicity Toube KC and Henry Phillips (instructed by **Millbank LLP**) for **a Steering Committee of Creditors**

Hearing date: 24th February 2023

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Approved Judgment

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SIR ANTHONY MANN

Sir Anthony Mann:

1. This is my judgment given in the matter of a Scheme under Part 26A of the Companies act 2006. The Plan Company (AGPS Bondco plc) seeks directions for the calling of a plan meeting under the Act. On Friday 24th February I announced that I would order the calling of such a meeting and gave directions. I delivered my decision on a handful of contentious matters that arose and indicated that I would give my reasons for my decision today. This judgment contains those reasons.

2. The background to this dispute is the financial difficulty in which the German Adler group finds itself. That group is a very substantial property group, owning a large number of rental properties and it is in the course of developing others. In broad terms its portfolio is said to be worth around €8bn, if I have understood an outcome report (referred to below) correctly. However, a combination of various factors including the Covid epidemic, the invasion of Ukraine, a downturn in the property market and an adverse short seller report published in October 2021 has led to a liquidity crisis which threatens the group. Its indebtedness includes various unsecured notes, including a series of notes with maturity dates in 2024, 2025, January 2026, November 2026, 2027 and 2029, all subject to German law. For the purposes of these proceedings those notes have been described by reference to their maturity dates (thus, for example, "the 2024 Notes"). Together, and for the purposes of this action, they are called the "SUNs". A restructuring plan has been proposed which requires the variation of the terms of those notes and that is the purpose of the scheme which is proposed in these proceedings.

3. The principal trigger for the scheme is the forthcoming maturity date of another note given by one of the companies in the group known as Adler Re. That note has a maturity date of 27 April 2023. At present the group does not have and will not have available cash necessary to repay that note and a failure to repay will trigger a default. That is capable of triggering cross-defaults across the group with the effect that various companies in the group would become insolvent in their local law terms, and that in turn would generate an obligation on the part of the directors to put those companies into insolvency proceedings at the risk of being found criminally liable if they do not. That would be likely to lead to the collapse of the group. That is the evidence that I have received and it has not been challenged before me, at least for the purposes of this hearing.

4. There is another risk to the group in the form of obligations under the SUNs and two further sets of obligations which would make the failure to produce audited accounts by the end of April 2023 an event of default. For reasons which I do not need to go into the group does not currently have auditors in place, and cannot get them and an audit in place by the end of April 2023. If any relevant lender treats that as a default then they could trigger default procedures and that again would lead to a significant

risk of cross-defaults elsewhere with the same insolvency consequences as I have just referred to.

5. In order to avoid these consequences the group proposes a refinancing arrangement for which purposes it proposes the scheme. Putting the matter shortly, it proposes to raise the sum of €937.5m (or €880m net of fees) ("the New Moneys") in order partly to repay the Adler Re loan and partly for liquidity purposes elsewhere in the group. At the moment it cannot straightforwardly do that because to do so would contravene the provisions of the SUNs both in terms of raising the money and in terms of the granting of security which is to go with the plan to raise the New Moneys. It is proposed to vary the SUNs in order to permit and facilitate the raising of the New Moneys. It is also proposed to postpone interest under those SUNs to help deal with the liquidity problems of the group.

6. Following negotiations with a steering committee of the holders of the SUNs the parent company and others entered into a lock-up agreement on 25th November 2022 with the steering committee and other adherents. Pursuant to that agreement the parties agreed that they would seek to pursue the implementation of amendments to the SUNs under German law by way of a contractual voting procedure known as a "Consent Solicitation". This would require the approval of 75% by value of those voting (with a quorum of 50% by value) under each of the SUNs; so each set of SUNs had to attain that level of approval for the proposal to work. The agreement provided that in the event of failure to achieve the desired result by that method then an alternative implementation would be sought including the possibility of a restructuring under German law or an English CVA. It was a term of the agreement that those joining it would support the promulgation of the overall scheme and not support another one.

7. In the event the Consultation Solicitation process attained the requisite majority in all the classes of SUNs apart from the 2029 SUN. In particular a group of holders, who formed an Ad Hoc Group (the "AHG") voted against the scheme within the 2029 SUN. 54% of the 2029 noteholders voted for the scheme, but that was not sufficient.

8. The group therefore turned to alternative methods of implementing the overall plan and have resorted to the new English Part 26A scheme (not a traditional CVA). The indebtedness at the time was still within the parent company, but by a substitution mechanism which is said to be incorporated within each of the SUNs the indebtedness was transferred to the Plan Company with a guarantee given by the parent. The validity of this substitution under German law is challenged by the AHG.

9. The indebtedness having been substituted into the English Plan Company, that company set about propounding the scheme. That scheme has the following elements (I need set them out only briefly in this judgment):

(i) The maturity date for the 2024 Notes is extended by a year to 31 July 2025. The maturity dates of the others will not be extended. That is designed to alleviate the group's immediate liquidity problems. In exchange for that the 2024 Notes will be given priority over the other series of the SUNs under a new inter-creditor Agreement.

(ii) There is to be an interest payment holiday under all the SUNs with no interest payable until 31 July 2025 and interest being capitalised. At that point it will be paid with an uplift of 2.75%, and thereafter interest will revert to its normal level and payment dates.

(iii) Amendments will be made to permit the raising of the New Moneys and to permit the refinancing of certain existing indebtedness and to achieve a modification of negative pledge covenants to allow for the creation of security.

(iv) There will be amendments to reporting covenants to alleviate the reporting obligations placed on the group, and in particular to remove the problem of there being no audited accounts of the financial statements as of 31 December 2022 by the end of April 2023.

(v) Various other amendments were proposed which it is unnecessary to set out here.

10. It is not part of the scheme itself, but as part of the overall restructuring the New Moneys will be provided by some of the noteholders under the SUNs. They all have an opportunity to participate, and some of them have agreed to underwrite the lending in exchange for a fee.

11. In this application, and in promulgating the scheme, it is the case of the Plan Company (and, of course, of the group) that the merits of the scheme have to be compared with the only apparent relevant alternative. That alternative is insolvency. Evidence has been filed in which it is said that if an insolvency is triggered in the group then the noteholders under the SUNs will receive a maximum of 57%, and conceivably less. However, if the scheme is approved and the New Moneys are then advanced then the projection is that an orchestrated realisation scheme and a recovery in the market and improved trading conditions will mean that all the noteholders will recover 100%, and it is conceivable that the group would be able to repay some of the later maturing SUNs early (though there is no current intention to redeem early).

12. A Part 8 claim form was issued on 20 February 2023. A Practice Statement Letter was circulated under the scheme Practice Direction on 26 January 2023 setting out the scheme and what are said to be its benefits. Nothing turns on the terms of that Letter at this stage; it is sufficient for the purposes of the court's determination at this stage to note its issue date and the fact that opposing creditors (essentially the AHG) have had details of the scheme appearing in that Letter since that date, though of course it

does not contain a lot of supporting detail which has materialised later. It is also significant to note that the AHG will not have been taken by surprise by the contents of that Letter because nature of the scheme had already been subject to the failed German procedure. That goes to the question of the timing of evidence to be filed by the AHG.

13. The application, which in the normal way seeks an order for the convening of Scheme Meetings, is supported by a witness statement of Mr Andrea Trozzi, director of the Plan Company who gives the main evidence about the scheme. There is also a witness statement of Mr Paul Cattermole which gives evidence of manner in which it is proposed to convene the meetings. It is the first of those two witness statements which gives a lot of supporting material in relation to the scheme, and in particular an important report from Boston Consultancy Group into the state of the Adler group and supporting the thesis that the scheme produces a much better result than the relevant alternative. The evidence also exhibits a report from a German lawyer supporting the case that the substitution was valid under German law and indicating that the German courts would recognise the result of these English court proceedings. A further report from an expert on Luxembourg law says that it is highly likely that the Luxembourg courts would recognise the results of the English court procedure too. The latter report is significant because some of the relevant entities within the group are Luxembourg-incorporated companies.

14. I am satisfied of the following points relevant to matters that have to be decided at a convening hearing in order to provide for a scheme meeting and a subsequent possible sanction hearing:

(i) The requirements of section 901A of the Companies Act 2006 fulfilled – the Plan Company is a company, it has encountered financial difficulties that are affecting or will, or may, affect its ability to carry on business as a going concern and a relevant compromise between the company and its creditors as proposed. This presupposes, for present purposes, that the substitution has been effective. It has been agreed between the parties before me (the company, the steering committee and the AHG) that bearing in mind the urgency of the matter and the lack of time to deal with it at this stage it is appropriate to put that issue off until the sanction hearing even though it would normally be appropriate to deal with it at this convening hearing. I agree with that decision. The AHG would also apparently wish to take the point that even if the substitution was valid as a matter of German law, what has happened in this case, in which an English company has been incorporated specifically for present purposes and to receive the substitution for the purpose of being able to apply under the Act, is a technique which should not be supported by the English courts, which should not allow the jurisdiction to be exercising these sort of circumstances. Again, this point will be dealt with at the sanction hearing.

(ii) I am satisfied that proper notice has been given of this hearing and that the Practice Statement Letter is in an appropriate form.

(iii) Classes of voting creditors have been correctly constituted. The company decided to take a conservative approach to the constitution of classes and treat each set of notes as a separate class. That is a justifiable stance in my view and I shall not lengthen this judgement by setting out the various authorities which deal with the correct constitution of classes. The AHG has a point about the artificiality of what has been done, which I confess I do not really understand, but whatever it is it is a point which can be taken at the sanction hearing. In considering the proper constitution of the classes I have considered various fees payable to some or all of the noteholders (in the events which have happened) such as a fee for underwriting and a fee paid under the lock-up agreement, and I agree with the Plan Company that they do not give rise to a fracturing of any of the classes. The AHG did not contend otherwise.

15. In the circumstances I consider that it is appropriate to give the company the permission sought to convene a meeting of the various classes of creditors and to provide for a sanction hearing thereafter. Originally it was proposed that the meeting should take place on the 24th March, but the company proposed accelerating that a little to 16 March and that was not opposed. It has the merit of enabling a little more time to deal with any points that might arise out of that hearing.

16. The most contentious aspect of the hearing before me was the directions that should be given in order to ensure an orderly hearing of the application for sanction. There is an urgency about this matter which requires a very tight timetable. I have already observed that that urgency of the matter does not at this stage permit the determination of matters which would naturally fall for decision at this convening hearing. On the basis of need for a decision by 12th April, for the reasons appearing below, there is simply no time to have those matters determined and then to order the sanction hearing. They are therefore to be raised (so far as still contentious) at the sanction hearing. This technique increases the pressure on the sanction hearing and on the timetable for getting there. The working assumption of the parties, based on the votes that each of them believes the other has (or has not), is that all classes of the SUNs apart from the 2029 notes will vote in favour of the scheme with the requisite majority, but the 2029 noteholders will not. If that assumption is wrong, and the 2029 holders vote in favour of the scheme, then, as I understand it, most of the difficult questions which otherwise full to be decided at the sanction hearing would fall away. If however the 2029 noteholders do not vote with an appropriate majority in favour of the scheme then the company and the other noteholders are likely to invite the "cramming down" of the dissenting 2029 noteholders based on a large overall majority across all notes in favour of the scheme. It is in anticipation of that sort of debate, and of other debates as to the fairness and appropriateness of the scheme, that the parties have been assessing the evidence that will be required.

17. The tight timetable requires a hearing before the Easter holiday. That is for the following reasons. If the New Moneys are not forthcoming by 27 April 2023 then the Adler Re debt will not be repaid, triggering a potential (and perhaps likely) default

mechanism which in turn would be likely to trigger other default mechanisms leading to the insolvency of the group. That is what the scheme seeks to avoid. In order to make sure that that does not happen the New Moneys have to be available to pay that debt, which means the Moneys have to be in the group's bank account the day before. The steps necessary to get the New Moneys arrangements in place will take, I was told (without evidence) nine working days. That makes Tuesday 12th April the last possible date for the pronouncement of the court's sanction. That is the Tuesday immediately after the Easter weekend and is obviously not the date on which the court would be sitting or could sensibly start a complicated sanction hearing. The court hearing, at least, has to take place before Easter, with a decision pronounced at some point between then and 12 April even if reasons follow later (which is likely). In practical terms the hearing has to start on Thursday 30th March or Friday 31st March.

18. It is estimated that the sanction hearing will, if all that is currently in issue is canvassed, take three days, though Mr Tom Smith Casey originally thought it might take four. There will be a significant amount of pre-reading – perhaps more than one day. The company has already filed its main evidence in support, so the next step will be the provision by the AHG of its evidence. It is around that date that the principal debate on directions has taken place.

19. It will be apparent from my description of how the case has developed that the nature of the evidence from AHG will have to deal with some very substantial issues – expert evidence of German law, expert evidence of Luxembourg law and evidence on the financial material which has led to the conclusion that the scheme is a better idea than the relevant alternative of insolvency. The AHG would seem to wish to challenge assumptions on which the complicated Boston Consultancy report has been based, and may, I suppose, wish to present its own different figures. This last point could give rise to some complex evidence.

20. The AHG's initial proposal for the delivery of its evidence was 18th April. However, they seem to have recognised that that was a hopeless assertion in the light of the financial exigencies which I have just referred to. That date was probably suggested before it was said that it would take nine working days to organise the money. Mr Smith did not propose such a late date at the hearing before me. Instead, he proposed 24th March as the date for his evidence. That would leave very little time for evidence in reply and the preparation of court material.

21. For his part part Mr David Allison KC for the company proposed 16th March with seven days thereafter for evidence in reply. He acknowledged that that was a very tight timetable for the AHG but said that it was required in this case in order to ensure an orderly hearing, and the shortness of the period (one day short of three weeks from the date of the application before me) was a fair period in all the circumstances bearing in mind that the AHG have known about the scheme for many weeks even if

they only had a lot of the flesh to put on the bones when the AHG received the substantial evidence of the company albeit no more than two working days before the hearing before me (it was served at 8 minutes after midnight).

22. This debate reflects the sort of tensions that will often arise in cases under the new Part 26A regime. On the one hand there will usually be an applicant presenting a case of urgency because that is of the nature of these applications, where a company is facing insolvency, that they are urgent. Delay may well often frustrate the purpose of the scheme, so it has to be got on relatively quickly. On the other hand, the presentation of opposition to the scheme, where it is opposed, will require the presentation, consideration and meeting of evidence which can be quite complex, and this case is certainly a manifestation of that. The complexity is magnified where matters normally dealt with at a convening application are put off to be dealt with, along with a catalogue of other matters, at the sanction hearing. In these circumstances the court has to strike a balance between the urgency of the company's case and fairness to the opposing creditors in the presentation of theirs. There will often have to be a tight timetable, but it must not be so tight as to operate unfairly as against those who oppose the scheme, particularly bearing in mind the complexity of the evidence with which they might have to deal. Opposing creditors have a legitimate interest in not being required to advance their case with unfair speed.

23. There is also the additional factor that court resources have to made available to deal with a complex case at a time when judicial resources are likely to have been committed to other cases because an urgent hearing is required. The hearing will have to take place at a time when a judge can be made available, and the timetable and presentation of the evidence must be such that the judge himself or herself is not disadvantaged by the presentation of a chaotic case.

24. All those matters arise particularly clearly in the present case. I can quite see how it will be very hard work for Mr Smith's team to meet the evidence of the company within just under three weeks from the date of my decision on the point. On the other hand, I do not think that the case can be properly presented and considered if Mr Smith's longer timescale is adopted. To have the second round of evidence presented, with little opportunity for effective reply evidence, just one week before the court hearing (and and even less before the court's pre-reading time) is not, in my view, going to be fair on the parties and the judge. At one stage I was attracted by the idea of dispensing with reply evidence (because there is going to be cross-examination in any event) and giving Mr Smith some of that time. However, I was persuaded that that was not the better way of organising the preparation and that the hearing would be more manageable if there has been opportunity for evidence in reply.

25. That means that one has to fall back on the timetable of Mr Allison. The difficulties of Mr Smith's team are somewhat ameliorated by the fact that his team have in fact

known of the nature of the scheme for weeks, and much of what is said in the evidence is not going to come as a surprise to them. It is apparent from submissions made to me that they have already taken German legal advice on the validity of the substitution, so they will not be proceeding from a standing start in relation to at least that part of the expert evidence. The AHG have a well-resourced and highly experienced professional team in place and in my view can fairly be expected to present their case within that timeframe. In the end, and balancing all factors I consider that Mr Allison's tighter timetable is the appropriate one and I shall so order. The parties were, of course, told this at the end of the hearing.

26. It will in any event be far from easy to conduct the hearing, if all issues remain live, within the timescale proposed. The hearing will have to be heavily case-managed, with time for cross-examination limited. The urgency of this matter will mean that both sides will have to trim their own cases and cross-examination to that which is manageable within the timescale which reflects the need for a speedy decision.

27. There was a disclosure issue in this case. The AHG were seeking disclosure of certain documents and information in order to enable them to meet (principally) the financial and solvency issues in this case. After a certain amount of discussion to which I was not privy, the parties agreed the disclosure to be given. There remained, however, a debate as to when it would be made available, with the AHG saying they needed it by noon today (Monday 26th February) in order to be able to have a meaningful meeting with their experts on Thursday, and the Plan Company proposing close of business tomorrow on the footing that some of the information was not contained in clearly defined existing documents and they would need time to pull that further information together. Both parties accepted my suggestion that the order should provide for information and documents to be provided "as soon as it was available" (thus requiring existing documents to be provided straight away) leaving only a longstop time for the rest. As to the longstop time, I had no more to go on than one side saying they needed time to provide it, and the other saying they needed time to consider it. In the end I determined that longstop time should be 6pm today. If that requires a lot more effort then it is right that the company should put in that effort. Bearing in mind the short timetable for evidence from the AHG it is right that they should have the information as soon as possible.

28. That leaves one contentious point about the disclosure of cross-holdings. The AHG are anxious to have an understanding of cross-holdings of noteholders within the SUNs. They say that that material is capable of being relevant to a consideration of the fairness of the scheme as it will be determined at the sanctions hearing because it can go to the question of the extent to which noteholders are influenced by considerations extraneous to the classes in which they are voting. The point was not developed at the hearing before me, but it seems to be accepted as a valid point in principle by the Plan Company and Steering Committee, at least for the purposes of today. To that end the AHG sought a direction about the content of the voting forms. Originally they sought a direction that the forms compel the noteholders to disclose their cross-holdings in the other SUNs. However, at the hearing Mr Al-Attar for the AHG (who dealt with this point on their behalf) modified this to requiring the voting

forms disclosing the investment managers of the noteholders voting. He submitted that this was within the court's powers under its general power to control and direct the meeting, and relied on *Re Veon Holdings BV* [2022] EWHC 3473 (Ch) at para 70 and on *In re Dee Valley Group plc* [2017] 3 WLR 767.

29. This was opposed by Plan Company and Ms Toube KC on behalf of the Steering Committee. However, while Mr Allison said that *Re Veon* seemed to say the opposite to what Mr Al-Attar said it said, he did say that the company was prepared to disclose such information as it had about cross-holdings in the chairman's report which would follow the meeting. Miss Toube submitted that all noteholders must be permitted to vote and the additional disclosure in the voting might disencentivise a noteholder from voting if they did not want to disclose that particular information, contrary to their prima facie entitlement.

30. I do not need to resolve the question of principle as to whether this court can adopt the course proposed by Mr Al-Attar, because I am satisfied that the disclosure of the information in the voting form sought by Mr Al-Attar would not achieve his objective. If a party does not hold via an investment manager then there is no information to give, though of course the name of the voter will then appear (though as the AHG accepted the name might be an uninformative SPV which did not disclose the beneficial owner). Since an investment manager might manage for a number of potential noteholders it would be impossible to extract meaningful information about cross-holdings from the identification of the fund manager. All it might enable one to do is ascertain a tendency of a fund manager to vote a particular way, but that says nothing about how noteholders are influenced. It would be highly speculative to suppose that anything useful would come from the information, but it is not highly speculative to say that a debate about it could be a serious and unwelcome distraction from the debate at the sanction hearing. I will therefore not order the modification of the voting form in the manner proposed by Mr Al-Attar and Mr Smith.

31. That deals with all the contentious matters on which I ruled. The remaining timetabling and other matters are agreed between the parties and I need say no more about them in this judgment.