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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
CHANCERY DIVISION  
[2024] EWHC 828 (Ch)



No. CR-2023-006234

7 Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Wednesday, 21 February 2024

Before:

MR JUSTICE RAJAH

I N T H E M A T T E R O F :

PLUSHOLDING GMBH

Applicant

\_\_\_\_\_  
MR D. BAYFIELD KC and MS C. COOKE (instructed by Latham & Watkins LLP) appeared on behalf of the Applicant.

\_\_\_\_\_  
J U D G M E N T

MR JUSTICE RAJAH:

- 1 This is the application of PlusHolding GmbH (the “*Company*”) for an order sanctioning a scheme of arrangement under Part 26 of the Companies Act 2006. The Company is owned by Phoenix BidCo 2 GmbH (the “*Parent*”), and the Parent is in turn wholly owned by PlusInvestment GmbH (the “*Target*”). The Target is indirectly wholly owned by Phoenix Lux Investment S.à.r.l (the “*Existing TopCo*”), which is the ultimate holding company. 100 per cent of the shares of the Existing TopCo are held by funds managed by BC Partners Group (the “*Sponsor*”). The Existing TopCo and its subsidiaries comprise the “*Group*”.
- 2 The Group’s business is the provision of data centres and IaaS cloud computing. It has 325 employees. The Company is the sole shareholder of PlusServer, a German limited liability company and the Group’s principal operating company.
- 3 The Group has been principally financed by the “*Term Facilities*”. These are borrowings by the Company and PlusServer, which are guaranteed by the Parent, which, as at 20 October 2023, had an aggregate amount outstanding of just under €265 million. The Term Facilities are due to mature on 31 August 2024 and the Company considers that it would be unlikely to be able to refinance the Term Facilities. Accordingly, the group has proposed a restructuring which the revised scheme is intended to facilitate (the “*Restructuring*”).
- 4 The Term Facilities were made available under a senior facilities agreement dated 18 August 2017 (as amended) which is governed by English law and subject to the jurisdiction of the English courts.
- 5 A convening order was made by Adam Johnson J on 15 November 2023. An Explanatory Statement (the “*Explanatory Statement*”) was circulated in compliance with s.897 of the Companies Act 2006. On 11 December 2023, a scheme meeting was held in accordance with para.2 of the convening order. There was a single class of creditors, being the lenders of the Term Facilities (the “*Scheme Creditors*”) and at that meeting 100 per cent of the Scheme Creditors present and voting voted in favour of the scheme. The Scheme Creditors present and voting constituted 96.12 per cent of the scheme creditors by value entitled to vote.
- 6 The scheme is required because there are Scheme Creditors which are collateralised loan obligations vehicles (“*CLO vehicles*”) amounting to some 3.88 per cent by value of the scheme creditors. They were unable actively to consent to any maturity extension of the Term Facilities because of fund constitutional or governance reasons. The CLO vehicles abstained from voting on the scheme, which is why the positive vote represented 96.12 per cent of all Scheme Creditors entitled to vote. All other Scheme Creditors have voted in favour.
- 7 35 out of 36 of the scheme creditors have entered into a Lock-Up Agreement to assist with the implementation of the scheme (the “*Lock-Up Agreement*”). The CLO vehicles entered into the Lock-Up Agreement as Abstaining Lenders (as defined in the Lock-Up Agreement). Only one Scheme Creditor has not entered into the Lock-Up Agreement, but that Scheme Creditor has voted in favour of the scheme at the scheme meeting and has provided an approval letter in respect of the revised scheme.
- 8 Following the scheme meeting, a problem arose. One of the conditions precedent in the implementation of the restructuring was not capable of being fulfilled. That condition was

the receipt of a ruling from a German tax authority permitting certain aspects of the restructuring. It became clear that that ruling would not be forthcoming. The Company issued a notice to the Scheme Creditors advising that a postponement of the sanction hearing was required to take stock.

9 The revised scheme has been formulated to deal with this problem. The Company says the revised scheme retains an economic proposal for the Scheme Creditors which is commercially the same in all material respects as that considered at the scheme meeting. In other words, from an economic perspective, they do not materially change the deal for the Scheme Creditors.

10 A supplement to the Explanatory Statement was circulated to the Scheme Creditors on 5 February 2024. Revised long-form documents were circulated on 7 February 2024 and the Company has obtained letters from each of the Scheme Creditors confirming that:

(1) The scheme creditor consented to the revised scheme and the amendments set out in the revised long-form documents;

(2) If the scheme meeting had been held in respect of the revised scheme and the revised long-form documents, the scheme creditor would have voted at the scheme meeting in the same manner as it voted at the scheme meeting; and

(3) The scheme creditor agreed with the Company's approach in seeking the court's sanction of the revised scheme at the sanction hearing.

The Abstaining Lenders confirmed their non-objection to the revised scheme.

11 The Company now seeks a sanction order in respect of the revised scheme.

12 On 14 February, the Company received confirmation that a binding tax ruling had been received in relation to the revised scheme. There are some further conditions precedents which are, however, required before the restructuring will become effective if sanction is granted.

13 If the restructuring were not to go ahead, it is considered likely that the Scheme Creditors would enforce the security held over the shares in PlusServer with a view to a sale of those shares or of the Group's business and assets and there is evidence that such a distressed sale would result in a discount of between 10 per cent and 35 per cent with respect to the returns to the Scheme Creditors and that may explain why there is such a high level of support for, and no opposition to, the revised scheme.

14 I turn to the proposed modification to the original scheme. The original restructuring involved, firstly, the scheme creditors becoming owners of the Target and, therefore, the Group, through a new Holdco and a new Topco, with 100 per cent of equity being allocated rateably to scheme claims. Secondly, the reinstatement or reduction of the Term Facilities of the Company and PlusServer to €95 million, with an extended maturity of 31 December 2028. Thirdly, the balance of the Term Facility up to €165 million would be reinstated as a Holdco PIK Facility stapled to each Scheme Creditor's shares in the new Topco. Fourthly, a new money facility under the existing Senior Facilities Agreement of up to €50 million and, finally, various releases and provision for some of the costs of the Sponsor and certain related parties.

- 15 The revised restructuring involves the principal change that the €165 million tranche of the Term Facility will be reinstated as an unsecured and subordinated PIK facility at the level of the Company. The Company submits that this achieves the same economic outcome for the scheme creditors as the original proposal of such a facility at the new Holdco level; that is, providing some equity upside in the Group in the event that prior ranking debt is repaid while relieving the Company's interest expense obligation on this element of the debt. I accept that submission.
- 16 Certain other consequential changes have been made to the revised scheme which result from the change in structure. The Company does not consider that these changes should impact the expected recoveries of Scheme Creditors or otherwise change the economic outcome of the restructuring which the Company considers remains commercially the same in all material respects as that described in the Explanatory Statement and I accept that, too.
- 17 The resolution which was put to the Scheme Creditors at the scheme meeting and approved by them was to approve the scheme subject to any modification, addition or condition approved or imposed by the court as described in cl.8 of the Chair's report. The original scheme, at cl.9.1, also contained a modification clause, as does the revised scheme, and that modification clause reads as follows:

*“The Company may, at any Sanction Hearing and, if reasonably practicable, after consultation with the Ad Hoc Committee's Advisers, consent on behalf of all Scheme Creditors to any modification of, or addition to, this Scheme or to any terms of conditions that the Court may see fit to approve or impose, and which would not directly or indirectly have a material adverse impact on the interests of any Scheme Creditor under this Scheme. However, if such modifications could reasonably be expected directly or indirectly to have a material adverse effect upon the interests of a Scheme Creditor, then the Company may not give such consent without the prior written consent of that Scheme Creditor.”*

- 18 I am satisfied that the Scheme Creditors agreed at the meeting, to the extent needed, that the court should have a mandate to make a modification to the scheme.
- 19 Having regard to the authorities, such as Re Equitable Life Assurance Society [2002] BCC 319 at [102] (Lloyd J) and Re AON plc [2020] EWHC 1003 (Ch) at [17]-[18] (Trower J), it seems to me I have to be satisfied that this is a scheme, as modified, which is substantially the same as the scheme which was voted upon, such that I can also be satisfied that I am not foisting a different scheme on the creditors, that their assent at the meeting is not undermined by the modification and it is a scheme which, had it been before them at that meeting, is one which it is clear they, as reasonable creditors, would have approved. I am so satisfied.
- 20 While the changes are more than merely technical, I am satisfied that the revised scheme is not so different, in terms of commercial and economic effect, to what had been approved by the scheme creditors, that it could be described in any way as foisting on creditors a substantially different scheme. The modifications therefore do not undermine the assent of the Scheme Creditors at the meeting. That they would have approved the revised scheme had it been before them is evidenced by the agreement or non-opposition of all the creditors to the revised scheme. I am also satisfied that the modifications do not alter class compositions or render irrelevant the Explanatory Statement.

- 21 The test for sanction was set out in *Re KCA Deutag UK Finance PLC* [2020] EWHC 2977 (Ch).
- 22 The first question is whether the statutory requirements have been complied with.
- 23 The constitution of the classes was determined by the court at the convening hearing. The court determined that a single scheme meeting was appropriate. The modifications since the convening hearing treat all Scheme Creditors equally. There is an emergency facility, which is new, and I have been taken to that. All creditors have been given the same opportunity on identical terms. It is a new facility which is not being provided under the scheme or pursuant to the scheme. I am satisfied that there is no fracturing of the class. There being no objection from any Scheme Creditor, there is no cause to revisit the decision which was made at the convening hearing.
- 24 The original Explanatory Statement was adequate. The Scheme Creditors here are all sophisticated financial actors.
- 25 The scheme meeting was convened and conducted in accordance with the convening order and the statutory requirements have been satisfied. 100 per cent of those who attended voted in favour, representing over 96 per cent in value. As I have already indicated, I am satisfied that the proposed revised restructuring is the same scheme in respect of which these statutory requirements have been complied with. I note that a supplement to the explanatory memorandum was served, which I am satisfied is clear enough, and further revised documents for the purposes of the sanction hearing, as well as notice of this hearing.
- 26 I am also satisfied there was fair representation of the scheme creditors. Those who attended and voted in favour were over 95 per cent by value and the remaining abstained and do not oppose the scheme or the revised scheme. The letters which have been received show that there has been no change to that position since the revision of the scheme and there is no reason to think that any of those creditors were not acting bona fide and for proper purposes. The scheme is likely, it is thought, to produce a better return than the comparator.
- 27 The next question is whether the scheme is one that an intelligent and honest man, acting in respect of his interest, might reasonably approve. The comparator report suggests that the alternative to the scheme is unattractive and there is an element of crystal ball gazing as to whether the Company, by continuing to trade, will create a better outcome for the scheme creditors, but I am satisfied that an intelligent and honest man acting in respect of his own interest might reasonably approve this scheme.
- 28 I am also satisfied there is no blot or defect in the scheme. There are some conditions precedent, but these are expected to be satisfied in short order. I have been taken through them. I am satisfied that this is not a case where the court is concerned that it should not act in vain. The conditions do not confer a discretion on a third party as to whether or not the scheme should go ahead and there is no subverting of the jurisdiction given to this court to be satisfied that the scheme is for the benefit of the creditors.
- 29 I do have to consider whether I have a sufficient assurance as to the effectiveness of the scheme in relation to international recognition. The Term Facilities are governed by English law and subject to at least the non-exclusive jurisdiction of the English courts. The real question I have to consider is whether in that context foreign courts would recognise an alteration of rights under those Term Facilities if made by this court. The fact that the Term

Facilities are governed by English law strongly suggests that a scheme sanctioned by the English court will be recognised internationally. The fact that all but one of the Scheme Creditors have entered into a Lock-Up Agreement whereby they are contractually prevented from undermining the scheme and which agreement is, itself, subject to an exclusive jurisdiction clause and a submission to jurisdiction clause in favour of England, also suggests that the scheme would be likely to be effective internationally.

- 30 Finally, Dr Stefan Sax in his report considers that the scheme is likely to be recognised in Germany, where the Company and the other obligors are incorporated. The scheme is, therefore, likely to be internationally effective on the basis of recognition in Germany also.
- 31 I will, therefore, approve and sanction this scheme.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers  
5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

This transcript has been approved by the Judge.