CASE NO: 4538 of 2015

[2016] 3562 EWHC (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 2 December 2016

BEFORE:

MR JUSTICE NEWEY

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IN THE MATTER OF DTEK FINANCE PLC

AND IN THE MATTER OF THE COMPANIES ACT 2006

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MR D BAYFIELD QC and MR H PHILLIPS (instructed by Latham & Watkins LLP) appeared on behalf of the company.

APPROVED JUDGMENT

Transcribed from audio by W B Gurney & Sons LLP,
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NB: No documents were provided to assist with the transcription

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MR JUSTICE NEWEY:

1. I have before me an application for an order to be made pursuant to section 896 of the Companies Act 2006 convening a meeting of creditors for the purposes of considering and, if thought fit, approving a proposed scheme of arrangement. The key objective of the scheme is to implement a restructuring of two series of notes issued in 2013 and 2015 by the relevant company, DTEK Finance plc. The plan is to replace those series of notes with a new single note.

2. DTEK Finance plc (which I shall call "the company") is a wholly owned subsidiary of DTEK Energy BV, a company which, along with its subsidiaries, operates the largest privately-owned energy business in Ukraine as measured by metric tonnes of coal produced, net output of electricity and electricity distributed. The company has run into financial difficulties as a result of events occurring in Ukraine. Since 2014 there has been a deterioration in the level of cash collected by the Group due to severe operational and logistical difficulties stemming from the armed conflict in the non-Government controlled territory of the Donbass region, a decrease in electricity generation levels and transmission and in coal extraction and transportation. To compound that, there has been a sharp contraction in the Ukrainian economy which, when taken in conjunction with other matters, has had a serious impact on the Group's business and financial situation.

3. The Group has for some time been in active discussions with its creditors. For relevant purposes, it is the discussions relating to the two series of notes which principally matter. So far as those are concerned, a noteholder steering committee

was formed to negotiate the terms of a note restructuring and on 18 November 2016 binding heads of terms for such a restructuring were agreed with the noteholder steering committee. Under the agreed terms, the existing notes would be exchanged for a new single note with an extended maturity date that is about seven years further in the future than is the case under the current notes.

4. The application before me now seeks to take forward that proposed restructuring. At this stage, the question is whether I should make an order convening a meeting of the relevant creditors.

5. Mr Daniel Bayfield QC, who appears with Mr Henry Phillips, has drawn to my attention particular matters that call for consideration. One such matter relates to class composition. The company proposes that there should be a single meeting of scheme creditors.

6. One point that arises there is whether the holders of the two sets of notes can appropriately be treated as a single class. The two notes differ in two particular respects. First, the maturity dates are different: for one the date is 28 March 2018 and the other is 4 April 2018. That cannot be a distinction that matters. Another difference relates to interest rates: the 2013 series of notes bears interest at the rate of 7.875 per cent, whereas the 2015 notes have a somewhat higher interest rate. It may well be that, even were the company solvent, that distinction would be considered not to be so great as to prevent creditors from consulting together with a view to their common interest and therefore not so significant as to require two separate meetings. However, whether or not that is so, what is at issue here is a company which in the

absence of a scheme such as that proposed would be likely to fall into a formal insolvency procedure under which, on the face of it, creditors could not hope to receive a return of more than 20 per cent. Looked at in that way, the noteholders of the different classes can appropriately be treated alike because on an insolvency event the different nominal rates of interest would be immaterial.

7. The other point that arises in relation to classes relates to certain fees for which there is provision:

(i) One such fee, which is to be paid to the steering committee, is referred to as a "work fee". It is not dependent on the outcome of the restructuring and it seems to me to be of no importance.

(ii) The second fee is a "restructuring fee" equating to 0.75 per cent of the outstanding principal, which is again intended to be paid irrespective of how creditors vote. In the circumstances it seems to me that this, too, is not of any real significance.

(iii) The third fee is a "lockup fee" payable to creditors who agree, or have agreed, to vote in favour of the scheme. I was told by Mr Bayfield that some 83 per cent of creditors have now signed up to this agreement and that they stand to receive a fee equal to approximately 0.76 per cent of principal.

8. As regards that last fee, there might be somewhat more room for argument than the other two that I have mentioned, but, again, the amount involved is as I see it too small to be likely to exert any material influence on creditors' voting decisions. It is substantially smaller than, for example, the consent fee of 2.5 per cent of face value that Morgan J considered in *Re Avangardco Investments Public Limited* (unreported, 24 September 2015). I therefore do not see any need for there to be more than one creditors' meeting.

9. The point which Mr Bayfield aired with me which I think requires slightly more comment relates to the recast Judgments Regulation. As is well known, there has been debate for a number of years as to the extent to which that is or is not applicable to schemes of arrangement but the courts have preferred not to arrive at any conclusion on the point. Mr Bayfield advances his submissions on the basis that, even assuming that the Regulation is capable of applying, his application can properly proceed having regard to article 8(1) of the Regulation, which states that:

> "A person domiciled in a Member State may also be sued:
>
> "(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> "…"

10. More than one judge appears to have accepted that article 8(1) will be satisfied if a single scheme creditor is domiciled in this jurisdiction. That view can be seen in the decision of Vos J in *Re Nef Telecom Co BV* [2012] EWHC 2944 (Ch) and that of Proudman J in *Re Metinvest BV* [2016] EWHC 79 (Ch). The approach can be said to

accord with the terms of article 8(1), in which there is specific mention of "any one" of a number of defendants being domiciled in the relevant jurisdiction.

11. An alternative view was espoused, at least to some degree, by Snowden J in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch); [2015] Bus LR 1046. Snowden J said this in paragraph 51:

> "On the assumption that the recast Judgments Regulation applies, article 8(1) would be potentially engaged provided that at least one creditor is domiciled in England and it is expedient to hear the 'claims' against all other scheme creditors together with the 'claim' against him. In the instant case, the numbers and size of the scheme creditors domiciled in England were far from immaterial, and in my judgment they were sufficiently large that the test of expediency was satisfied. I therefore considered that I was entitled to regard all scheme creditors as coming within the jurisdiction of the English court under article 8(1) for the purposes of the exercise of the scheme jurisdiction in relation to them."

Snowden J thus looked at whether the numbers and size of the scheme creditors domiciled in England "were sufficiently large that the test of expediency was satisfied".

12. Snowden J returned to the topic in his judgment in *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch). He said this in paragraph 25 of his judgment:

> "In a number of cases, the courts have expressed the view that on the assumption that the recast Judgments Regulation applies to schemes, and treating the company as claimant which is suing the scheme creditors, provided that at least one such creditor is domiciled in the United Kingdom, article 8 is potentially engaged. The question will then be whether it would be expedient to hear and determine the application for sanction of the scheme as regards the other creditors to avoid inconsistent judgments from separate proceedings. On one view, this question will necessarily be answered in the affirmative because of the desirability of

> binding all scheme creditors to the same restructuring: see *Re Metinvest BV* [2016] EWHC 79 (Ch) at paragraph 33. Alternatively, the answer may depend upon a consideration of the number and value of the creditors domiciled in the United Kingdom: see *Re Van Gansewinkel Groep BV* at paragraphs 41 to 45."

13. Snowden J went on in his judgment to consider the extent to which creditors were domiciled in the United Kingdom and concluded at paragraph 28 that, if the recast Judgments Regulation were applicable, jurisdiction could be established under article 8 "on the basis that sufficient creditors by number and value are domiciled in the United Kingdom and that it is expedient to determine whether the scheme should bind the other scheme creditors in these proceedings in England".

14. I should perhaps also mention that there have been other recent cases where judges have not seemed to adopt quite the approach that Snowden J appeared to favour in the *Re Van Gansewinkel Groep BV* case.

15. I do not need to arrive at a final conclusion on the implications of the recast Judgments Regulation today. As the evidence stands, two scheme creditors are known to be domiciled in the United Kingdom. They hold approximately 0.722 per cent by value of the debt under the existing notes. If it is enough that a single creditor is domiciled in the United Kingdom, then article 8(1) is plainly satisfied because there are two such creditors.

16. It is fair to say that, on the basis of the information currently available, the number of creditors domiciled here is very small and the value of the debt for which they account similarly so. My provisional view, however, is that that does not matter.

17. Article 8(1) of the recast Judgments Regulation does not in terms require more than "any one" defendant to be domiciled in the jurisdiction. The article goes on to make reference to whether "claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings", but again it is not said that the number of domiciled defendants determines whether it is "expedient" to hear and determine matters together. On the face of it, the focus is on how "closely connected" the claims are rather than where other defendants are domiciled. In the circumstances, it seems to me, at any rate provisionally, that assessing "expediency" in this context must involve more than merely looking at how many creditors beyond one are domiciled in the jurisdiction or the value of the debts that they hold.

18. There is a persuasive argument that at least in the case of a company such as this one, which is incorporated in this jurisdiction and has its centre of main interests (or "COMI") in England, the existence of just one creditor with a domicile here will make it expedient for an English court to hear an application for a scheme of arrangement to be approved. In the case of an English incorporated company, with its COMI in the jurisdiction, there might be said to be a legitimate expectation on the part of creditors that any restructuring would occur either in this jurisdiction or, perhaps, in the jurisdiction of the law governing the debts. Creditors would seemingly have no expectation of a restructuring being the subject of proceedings in their own home jurisdictions, where those are different. In any case, the claim against the "defendant" domiciled here might be thought to be so "closely connected" to the claims against other "defendants" as to make it "expedient" for the claims to be dealt with together. As Snowden J noted, the desirability of binding all

scheme creditors to the same restructuring is, on one view, sufficient to establish the requisite expediency.

19. If it is appropriate to have regard to the number and value of creditors within this jurisdiction, it seems to me that where, as here, many creditors have submitted to the jurisdiction, that must also be relevant. So far as this particular case is concerned, there is a lockup agreement containing a provision under which a noteholder subscribing to it "acknowledges and submits to the jurisdiction of the English courts and agrees that, insofar as is necessary or appropriate, it would be willing to be joined formally to the scheme of arrangement as [a] defendant". As I mentioned earlier, some 83 per cent of noteholders have in the event signed up to the lockup agreement and so submitted to the jurisdiction of the English courts. The overwhelming majority of those creditors, at least on the available evidence, do not appear to be domiciled in this jurisdiction, but it equally seems to me that the fact that they have submitted to this jurisdiction may bear on the relevant expediency and indicate that it is indeed "expedient" to allow the company to proceed with its application.

20. In short, as I have said, I do not need to arrive at a final view on the applicability of article 8(1), but my provisional view is that article 8(1) does not present any obstacle to the proposed scheme and that, in the circumstances, it should not deter me from making an order for a meeting of creditors to be convened.

21. The final matter that I should mention is that in the course of the hearing a minor glitch emerged in the documentation. The draft scheme includes in a schedule

provision for the "noteholder terms sheet", but as the scheme is currently drafted there is no definition of that term or cross-reference to the schedule. Mr Bayfield has explained that that matter will be tidied up and I accept the assurances that he has given. That being so, it seems to me that it is appropriate for me to make, as asked, an order convening a meeting of scheme creditors and, to that end, to make an order in the terms of the draft with which I have been provided.
