Claim No: CR-2018-008908

Neutral Citation Number: [2018] EWHC 3098 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
COMPANIES COURT (CHD)

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Monday, 12 November 2018

BEFORE:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- - - - - -

IN THE MATTER OF STRIPES US HOLDINGS INC
(THE "COMPANY")
AND IN THE MATTER OF THE COMPANIES ACT 2006

- - - - - -

MR MARK ARNOLD, QC and MR ADAM AL-ATTAR (instructed by **Linklaters LLP**) appeared on behalf of the Company

Hearing date: 12 November 2018

- - - - - -

Approved Judgment

Epiq Europe Ltd,
8th Floor, 165 Fleet Street, London, EC4A 2DY

MR JUSTICE MARCUS SMITH:

Introduction

1. This is an application by Stripes UK Holdings Inc (the "Company") for the approval of a scheme proposed by the Company (the "Scheme"). The application is made pursuant to section 896 of the Companies Act 2006.

2. The matter was last before the court on the Company's application to convene a single meeting of the creditors of the Company (the "Scheme Creditors") to consider and, if thought fit, to approve the Scheme. The convening order was made by Zacaroli J on 24 October 2018. He gave a short judgment on that occasion, reported under neutral citation number [2018] EWHC 2912 (Ch).

The Scheme

3. It is convenient to take the description of the Scheme from Zacaroli J's judgment. The following description derives substantially from what is set out by him in paragraphs 1 to 7 of his judgment.

4. The Company is incorporated in the State of Delaware in the United States. Its ultimate parent is Steinhoff International Holdings NV ("Steinhoff") and its immediate parent is Steinhoff Europe AG ("SEAG"). The Company is registered as having a UK establishment.

5. The Steinhoff group principally manufactures, sources and retails household goods across the world. The Company is itself the parent of a company called Mattress Firm Holding Corp, whose direct and indirect subsidiaries carry on a business referred to as "Mattress Firm", being the leading retailer of mattresses in the US. The shares in Mattress Firm are the Company's only significant asset.

6. The Scheme relates solely to creditors under a US$200 million revolving credit facility, governed by an agreement dated 5 August 2015. That agreement is governed by English law. The Company is the borrower; Steinhoff and SEAG are guarantors.

7. The Company is currently in default under the facility, the whole amount and interest being due. Default interest of one per cent is accruing on overdue amounts.

8. The Scheme before the court is a relatively simple one. The Scheme Creditors will transfer all their rights under the facility to SEAG in return for a *pro rata* share in new debt instruments under which SEAG is the borrower and Steinhoff the guarantor (the "New Debt"). The terms of the New Debt will substantially restate those of the existing facility, but with an extended maturity date. SEAG, as the sole lender under the facility, will then contribute to the debt to the capital of the Company, with the facility being cancelled.

9. The Scheme is part of a much wider restructuring of the financial indebtedness of the group. Of particular relevance is the restructuring in respect of Mattress Firm. Mattress Firm has underperformed for the past 18 months and has been experiencing a liquidity crisis. On 5 October 2018, each of the subsidiaries of the Company within the Mattress Firm subgroup filed for protection under Chapter 11 of the US Bankruptcy Code. Under that Code, they seek approval of a pre-packaged plan which will see the group emerging from Chapter 11 within 45 to 60 days, the timing being linked to a day in late November called "Black Friday". This is in order to take full advantage of the anticipated boost in sales which traditionally occurs on that day. It will therefore readily be understood that there is an element of urgency in this application.

10. The restructuring involves the injection of new finances under what is called an "Exit Facility", to be offered to Mattress Firm Inc in the sum of US$400 million. The consideration for that lending includes equity interests in, and debt issued by, the Company. There would be little attraction in such equity and debt interests unless the Company cleansed itself of existing indebtedness. As part of the wider restructuring, in addition to the discharge of the facility pursuant to the Scheme, substantial inter-company indebtedness owed by the Company to other group companies will be discharged by way of a series of bilateral agreements, which are connected with, but which are not part of the Scheme. In this way, intra-group indebtedness will be contributed to the capital of the Company. The wider restructuring also involves the restatement and extension of maturity in respect of the financial indebtedness of SEAG and a further intermediate holding company of the group.

11. The Company considers that, absent the restructuring, Mattress Firm would be in a precarious financial position, with the consequence that the Company's sole asset, its equity in Mattress Firm, would be valueless. In that event, the Scheme Creditors would receive no return from the Company and would be reliant on an uncertain level of return pursuant to the guarantees offered by Steinhoff and SEAG.

12. In paragraph 7 of his judgment, Zacaroli J concluded that the exit facility was vital to the restructuring. Although a fall-back plan had been identified, in case the Scheme was unsuccessful, it was subject to considerable uncertainties. Aside from that possibility, the Scheme was essential for the Exit Facility to be implemented.

13. The Scheme thus has real benefits for the Scheme Creditors. This point was made by Zacaroli J in his judgment and is also emphasised in the very helpful written submissions provided to me by Mr Arnold, QC and Mr Al-Attar, who appeared for the Company.

14. Paragraph 5(4) of the Company's written submissions notes that the likely alternative to the successful refinancing of Mattress Firm is what is described as a "freefall", which is an unplanned exit from the Chapter 11 plan or even the entry of Mattress Firm into a liquidation proceeding under Chapter 7 of the US Bankruptcy Code. In either of those events, it is suggested, the value of the Company's equity interest in Mattress Firm, its sole significant asset, will be

destroyed. The Scheme Creditors would likely receive a nil recovery from the Company and there would be only a partial recovery under the guarantees.

15. For this reason, it is suggested the Scheme has a real benefit for Scheme Creditors, because Scheme Creditors will gain a new debt claim under the New Debt facility, which will be significantly stronger than the existing debt claim. An analysis undertaken by the Company, to which I have been taken, supports the prospect of payment in full. Of course, that is dependent upon projections into the future, which may not eventuate, but that analysis does show that the prospects of recovery will be enhanced in proportion to the success of the Chapter 11 plan.

16. Therefore, it is suggested, the interests of Scheme Creditors are aligned with the preferred option of the Company and the lenders under the exit financing as to how to implement that financing. It is not in the interests of Mattress Firm or any of its stakeholders to delay this refinancing.

The meeting of the Scheme Creditors

17. Pursuant to the convening order of Zacaroli J, a meeting of the creditors took place. The requisite statutory majority both by number and by value was obtained at the Scheme meeting. The Scheme Creditors representing 100% by value and 100% by number of those Scheme Creditors present and voting at the Scheme meeting, either in person or by proxy, approved the Scheme. Those Scheme Creditors represented by value 92.46% and by number 61.29% of all Scheme Creditors entitled to vote at the Scheme meeting.

18. I have been provided with a little further information regarding the non-attendance of certain Scheme Creditors. In all, there are 31 such creditors. Of these, 19 attended the meeting in person or by proxy. What of the other 12, one might ask? Mr Arnold has told me that 11 of those 12 are all linked entities. They are all locked into the Scheme: that is to say, they were obliged to vote in favour of it. That they did not do so appears to have been as a result of an administrative failing, in that the relevant papers were not filed in time. So far as the twelfth non-attending Scheme Creditor is concerned, it appears that there was simply a disinclination to participate: but there is no complaint from that Creditor recorded as to the procedure that has been adopted.

19. So, the position that one is faced with at the conclusion of the Scheme meeting is that not only did an overwhelming majority of Scheme Creditors vote positively in favour of the Scheme; but also that there is an absence of any real, and certainly an absence of any articulated, dissent to the Scheme from those Scheme Creditors who did not vote at all. Very significantly, as I say, no-one voted against the Scheme.

The application for the sanction of the Scheme

20. As I have said, this is the application for the sanction of the Scheme. The relevant provision for sanction is section 899 of the Companies Act 2006. This materially provides as follows:

> "(1) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be) present and voting either in person or by proxy at the meeting summoned under section 896, agree to any compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.
>
> (2) An application under this section may be made by - (a) the Company..."

I pause to note that it is the Company that makes this application in this case.

21. Subsection (3) provides that a compromise or arrangement sanctioned by the court is binding on (amongst others) the creditors *inter se* and the creditors and the company.

22. It is unnecessary to go into detail, but there are, of course, other persons involved in the Scheme and in the wider restructuring. They are not automatically bound by section 899(3) of the 2006 Act, and I have been taken to the undertakings given by these third parties, undertaking to the court, amongst others, that they will do what is necessary to implement the Scheme.

23. The general approach of courts to an application for the sanction of a scheme is helpfully summarised in the Company's written submissions. In particular, reference is made to *Re Telewest Communications (No. 2) Ltd* [2005] 1 BCLC 722 at [20] – [22] *per* David Richards J. He, in his turn, cited a decision of Plowman J in *Re National Bank* [1966] 1 All ER, 1006 at p1002. Plowman J himself referred back to a long-standing passage in *Buckley on the Companies Acts*, which itself had and has been approved and applied on many occasions. Quoting from this, it says:

> "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
>
> The court does not sit merely to see that the majority are acting *bona fide* and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting unless the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which is empowered to bind, or some blot is found on the Scheme."

24. There is thus a three-stage process of assessment.

> (1) The technical provisions of the statute must have been complied with.
>
> (2) The class must be fairly represented by those attending the meeting, acting *bona fide*.

(3) The arrangement must be such that an intelligent honest man, albeit acting in respect of his own interests, would reasonably approve such a Scheme.

That, substantially, is the analysis that I propose to adopt in considering whether to sanction the Scheme here. First compliance with the statutory requirements; secondly, the *bona fides* of the majority; and thirdly the question of whether the Scheme is appropriate according to the test as I have described it.

25. There is a fourth point, which is the question of jurisdiction. As I noted at the outset of this ruling, the Company is incorporated in the State of Delaware and by no means all of the Scheme Creditors are actually domiciled in this jurisdiction. That gives rise to two jurisdictional questions regarding the jurisdiction of this court to approve the Scheme:

(1) Is there jurisdiction over the Company?

(2) Is there jurisdiction over the Scheme Creditors?

There is a third question, which is how the American jurisdiction would react to an order of this court approving the Scheme, bearing in mind that the Scheme is a part of wider a wider insolvency proceeding whose home is the United States.

Compliance with the statutory requirements

26. I begin then with the question of compliance with the statutory requirements. There are three questions that I must ask myself. First, whether the statutory majorities were obtained. Secondly, whether there has been compliance with the terms of the convening order. Thirdly, whether the classes in respect of the Scheme meeting were properly constituted.

27. The first two requirements can be dealt with extremely quickly. It is evident from what I have said and what I have been shown that the statutory majorities were obtained, and they were obtained in a fairly overwhelming number.

28. Secondly, I am satisfied that there has been compliance with the terms of the convening order of Zacaroli J.

29. The third question is whether the classes in respect of the Scheme were properly constituted. Now, this is a question which I should approach with a degree of trepidation, because that question was considered by Zacaroli J and disposed of in his judgment. Whilst I obviously do have jurisdiction to consider whether the class was properly constituted, I ought to be slow to revisit a decision that has been made earlier on in the process after argument and after a reasoned judgment has delivered.

30. More to the point, there has been no suggestion by any Scheme Creditor, including those who did not vote, that Zacaroli J was wrong to convene a single meeting of the Scheme Creditors, which is what he did.

31. I accept the submission that I should be satisfied that the class for the Scheme meeting was constituted.

32. I should say that there is a degree of back-bearing in this conclusion. The second question, which I will be coming to in a moment, turns on the *bona fides* of the majority at the meeting. Had I been concerned that there was an element of oppression of the minority by the majority at this meeting, then I would have been much more inclined to re-visit the question of class than I am. That is because – to state my conclusion on this issue before giving my reasons – I am satisfied that the majority at the meeting had been acting *bona fide* and was not acting in oppression of the minority.

The *bona fides* of the majority

33. Turning them from compliance with the statutory requirements to the question of *bona fides*, as I have already noted, the turnout at the Scheme meeting was high. To repeat, Scheme Creditors voting represented 92.46% by value and 61.29 % by number of all Scheme Creditors.

34. Very significantly no-one voted against the Scheme and I have explained why the 61.29 per cent by number of all Scheme Creditors is actually artificially low. It does not represent, in my judgment, any indication of a silent dissent to this Scheme.

35. Very properly, Mr Arnold has drawn to my attention two matters that I ought to consider as to whether there has been any sort of oppression by the majority of the minority. He has drawn my attention to first the fact that certain Scheme Creditors, but not all of them, are participating in the Exit Facility. That might suggest the existence of a special interest in certain Scheme Creditors which is not shared by other Scheme Creditors and which, so the argument would go, has caused the Scheme to be forced on the minority by the majority. I consider that there is a short answer to this potential objection. The fact is that there are Scheme Creditors voting in favour of the Scheme, even though they are not participating in the Exit Facility. I am told that there are nine Scheme Creditors who are not entitled to participate in the Exit Facility but who still voted in favour of the Scheme. That is the 22.9% in value of all the Scheme Creditors.

36. This is the answer to the suggestion of oppression or lack of *bona fides* so far as the Exit Facility is concerned. I do not consider the point to be at all well-founded.

37. There is a secondary point, which is that the Exit Facility is not executed under or pursuant to the terms of the Scheme: it is simply part of the wider arrangement between the various parties in the US restructuring. I shall not consider this point further. It seems to me that much the most powerful point is the fact that there is simply no evidence at all of any forced consent or coercion of a minority. What we have is <u>everyone</u> voting in favour, those having a special interest arising out of the Exit Facility and those not, and no kind of dissent from the non-voters.

38. The second point is rather similar. The lock up agreement, which is part of the implementation steps towards the general restructuring, seeks to tie in at an early

stage Scheme Creditors. As a result of this, certain consent fees are payable. It might, it is suggested by Mr Arnold, acting as devil's advocate against himself, that the votes of those in receipt of such consent fees are not representative of the class. These voters are actuated by the consent fees to override the interests of those other persons participating in the meeting, or able to participate in the meeting.

39. For substantially the reasons considered by Zacaroli J in his judgment, this is not a reason to infer any kind of absence of *bona fides* on the part of the statutory majority. The fact is that these consent fees are a tiny fraction in terms of the value at risk. The fact is that there is strong reason on the part of all creditors to vote in favour of the Scheme for the reasons I have described. It may be that the consent fees issue and the Exit Facility issue incline some Scheme Creditors to be even more enthusiastic in voting for the Scheme than they otherwise would be. But I certainly detect nothing adverse to those not falling within these two categories to suggest that those persons not benefiting from the consent fees or not participating in the Exit Facility would be overriding the interests of others.

40. Therefore, I find that there is *bona fides* on the part of the statutory majority.

Would an intelligent, honest man reasonably approve?

41. I proceed to the next question, which is closely related to the matter of *bona fides*, which is whether the Scheme is appropriate. It was submitted to me that the Scheme is one that an intelligent and honest man, a member of the class acting in respect of his own interests, might approve. The reason for this submission is plain to see. The Company considers that the Scheme is likely to lead to a better outcome for Scheme Creditors than would be the case if the Scheme were not to be implemented.

42. That is, it seems to me, is substantially reinforced by the fact that an overwhelming majority of the Scheme Creditors – with no dissent – have given their approval to the Scheme.

43. The court, of course, is not bound by the outcome of the Scheme meeting. But it is well established that the court should be slow to differ from the view of that meeting, unless there is some concern regarding either the conduct of that meeting (which I just stress I do not have in this case) or there is some articulated reason by a participating scheme creditor as to why the scheme should not be approved. Were there such an articulated dissent in this case, I would obviously take great care to understand it and give it due weight. But the fact is there is no such articulated dissent in this case. There is, as I find, no dissent at all.

44. In this case, it seems to me that I am driven to conclude that the Scheme Creditors are not only the best judges of what is in their commercial interest, but in this case they have spoken quite literally with one voice.

45. I therefore conclude that the Scheme is appropriate. Absent the jurisdictional questions to which I will turn shortly, it seems to me therefore that it is entirely appropriate that the Scheme be sanctioned.

Jurisdiction and the exercise of jurisdiction in this case

46. I therefore turn to the question of jurisdiction.

47. Jurisdiction needs to be considered at two stages. First of all, does this court have jurisdiction to determine the matter? That first question itself breaks down into two stages. Stage 1: do I have jurisdiction over the Company itself; and, stage 2, do I have jurisdiction to make an order in respect of Scheme Creditors, not all of whom are domiciled in England and Wales.

48. The second question is whether there is a sufficient connection between what is after all a foreign corporation and this court. This question also has two elements. The first is the sufficiency of the connection between the Company and this court; the second involves the effectiveness of the order that I am being asked to make. By that I mean, if made, would this order be respected in the country where it is most significant, that is to say in the United States?

49. I turn to these questions now.

Jurisdiction in relation to a foreign company

50. So far as the question of jurisdiction in relation to a foreign company is concerned, the law is clear. It is well-established that the court has jurisdiction to sanction a Scheme in relation to a company provided that company is liable to be wound up under the Insolvency Act 1986.

51. The power to wind up a company extends to a foreign company. It follows, therefore, that the court can sanction a Scheme in relation to this Company. Jurisdiction as regards the Company exists.

Jurisdiction over the Scheme Creditors

52. Turning next to the Scheme Creditors, it has been pointed out to me that certain of the Scheme Creditors are incorporated in EU member states other than the UK. In terms of the metrics of the 31 Scheme Creditors, some six by number (26.35% by value) are domiciled in this jurisdiction.

53. The question of jurisdiction as regards the Scheme Creditors is by no means straightforward. It is clear that the Insolvency Regulation and the Recast Insolvency Regulation do not affect the Scheme.

54. The more difficult question is whether the Recast Judgment Regulation applies. It is an open and unresolved question as to whether it does. In order to avoid resolving this issue, this court has developed the practice of considering whether jurisdiction would exist on the assumption that the Recast Judgment Regulation applies. If such jurisdiction can be found, then the anterior assumption of the application of the Regulation does not have to be considered further. Of course, matters would be different if one did not find jurisdiction to be established. In that

case, it would be necessary to consider whether the Recast Judgment Regulation did not apply.

55. The Company submits that this is a case falling within Article 8 of the Recast Judgment Regulation. Article 8 provides that a person domiciled in a Member State may also be sued, where he is one of a number of defendants, in the courts of the place where any one of those defendants 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.

56. Given that this is a case where one Scheme is being approved in relation to all participating Scheme Creditors, it does seem to me almost unanswerable that there would be a risk of irreconcilable judgments if separate proceedings existed in different jurisdictions selected by reference to creditor domicile.

57. It is clear that the claims of all Scheme Creditors are inextricably connected. That is inherent in the nature of the Scheme that I am being asked to sanction.

58. There have been a series of cases considering this question. Some cases hold that jurisdiction is established where one or more Scheme Creditor is domiciled in the jurisdiction. In short, a very low standard: one creditor is enough. Other cases suggest that a "sufficient number" of creditors must be domiciled in the UK, without necessarily saying what a sufficient number might be.

59. In this case, I do not need to consider which approach is correct, although I must say that I do consider that Article 8 provides a pretty clear steer. In this case, as I have noted, six of the 31 Scheme Creditors were domiciled in this jurisdiction as at the voting record time, which is 19.4% by number, 26.35% by value.

60. I consider that this is more than sufficient to entitle me to found a jurisdiction for this matter on the basis of Article 8 on the basis that a sufficient number of creditors are domiciled in this jurisdiction.

61. I therefore consider that, from the two standpoints that I am required to consider, that is to say jurisdiction over the Company and jurisdiction over the Scheme Creditors, that I do indeed have jurisdiction.

The exercise of jurisdiction

62. It does not follow from this that I should exercise that jurisdiction, although my conclusion in paragraph 45 above is a pointer in that direction.

63. So I come to the final point, which is the question of sufficient connection with this jurisdiction and the effectiveness of any order I might make. As I pointed out early on in this ruling, in this case the relevant agreement which is the subject of the Scheme has a governing law which is English law. Generally speaking, that is enough to establish a sufficient connection. The view is that under generally accepted principles of private international law, a variation or discharge of contractual rights in accordance with the governing law of the contract should be

done by the court of that law and will be given effect to in other third-party countries.

64. So, it seems to me that this is a case where simply by reason of the applicable law, there is a sufficient connection.

65. Related to this, however, is the question of efficacy. I would want to be quite cautious in terms of exercising my discretion in relation to sanctioning the Scheme were it to be the case that this is something that would affront comity with courts in the United States or in some way cut cross the jurisdiction under Chapter 15 of the US Bankruptcy Code.

66. I am satisfied, however, that is not the case. I have seen and read the evidence of Mr Glosband, an expert in the relevant parts of American law. He considers that the order that I am being asked to make in this case would likely be recognised and be given effect in the courts of the United States. Obviously, it is up to the courts of the United States to determine what they make of the order that I am being asked to make, but I am satisfied that in making the order I am in no way cutting across the jurisdiction of the American courts. To the contrary, I believe I am assisting.

Conclusion

67. All of the requirements that need to be met in relation to the Scheme have been met. I should exercise my discretion in favour of making the order that is sought. Accordingly, I order that the Scheme be sanctioned.