Neutral Citation Number: [2019] EWHC 1278 (Ch)

Case No: CR-2019-001002

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

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

Date: 21 May 2019

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF OPHIR ENERGY PLC

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

Andrew Thornton (instructed by **Linklaters LLP**) for the Applicant

Hearing date: 17 May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is an application for the sanction of a scheme of arrangement ("the Scheme") pursuant to Part 26 of the Companies Act 2006 ("the Act").

The Scheme in outline

2. The purpose of the Scheme is to enable Medco Energi Global PTE Ltd ("Bidco") to acquire the entire issued and to be issued ordinary share capital of Ophir Energy Plc ("the Company"), excluding ordinary shares held by the Company in treasury (the "Scheme shares").

3. The Company is an independent upstream oil and gas exploration and production company with a diverse portfolio of assets in Indonesia, Thailand, Vietnam, Malaysia, Mexico and Tanzania. The Company was founded in 2004 and has been listed on the London Stock Exchange since 2011.

4. Bidco is a wholly-owned subsidiary of PT Medco Energi Internasional Tbk, a company incorporated in Indonesia ("Medco"). Medco is a leading Southeast Asian energy and natural resources company whose shares are listed on the Indonesian stock exchange. Bidco currently holds the non-Indonesian oil and gas assets of the group headed by Medco.

5. The Company has a portfolio of international oil and gas assets. Medco believes that a combination of the two businesses will benefit from synergies and create a stronger Southeast Asian presence with greater scale, a wider geographical footprint and a more balanced portfolio of assets.

6. The takeover of the Company by Medco is unanimously recommended by the directors of the Company, who have received advice from Morgan Stanley & Co. International plc and Lambert Energy Advisory Limited. The directors have given irrevocable undertakings to vote in favour of the Scheme in respect of their own holdings of shares which amount to about 0.14% of the Scheme shares. The intention is that they will all leave the Company in accordance with the terms of their service contracts after it is acquired by Bidco, and they have no other material interests which are dependent upon the outcome of the Scheme process.

7. The Scheme is structured as a simple 'transfer' scheme and involves the Scheme shares being transferred to Bidco in exchange for cash. There are options outstanding in relation to the Company's share capital which are capable of exercise. If and to the extent that the Company issues shares out of treasury pursuant to the exercise of options prior to the Scheme record time, they will participate in the Scheme. If exercised after the Scheme has taken effect, the shares acquired will be automatically transferred to Bidco pursuant to the provisions of the Company's amended articles of association for the same consideration received by Scheme shareholders.

8. The consideration to be received by the Scheme shareholders is 57.5 pence in cash for each Scheme share held at the relevant record time, which values the entire issued share capital of the Company at approximately £408.4 million. This represents a significant premium to the undisturbed share price for the Company's shares which was 33.2 pence per share on 28 December 2018, being the last business day before the announcement of a possible offer for the Company by Medco.

Rival interest in the Company

9. After the announcement of a possible offer from Medco, on 17 January 2019 the Company received a formal proposal from Soco International plc ("Soco") regarding a proposed offer to acquire the whole of the issued and to be issued share capital of the Company in exchange for shares in the capital of Soco. On 22 January 2019 the board of directors of the Company resolved unanimously to reject the Soco proposal and there were no meaningful interactions between the Company and Soco thereafter.

10. The proposed acquisition by Medco was announced on 30 January 2019. The price offered was 55 pence per share. The Scheme document was then posted to shareholders on 1 March 2019 in accordance with the order of ICC Judge Barber of the same date.

11. On 6 March 2019, following market speculation relating to the Soco proposal, Soco announced that in light of the proposed acquisition of the Company by Medco, Soco did not intend to make an offer to acquire the Company.

12. Two days later, on 8 March 2019 the Company received an unsolicited preliminary indication of interest from Coro Energy plc ("Coro"), a relatively small AIM listed company, regarding a proposed offer to acquire the shares in the Company in exchange for payment of 40p in cash and an undetermined number of shares in the capital of Coro for each ordinary share in the Company.

13. In addition, a shareholder of the Company, Sand Grove Capital Management LLP ("Sand Grove") increased its interest in the Company to become its largest shareholder, with an interest of approximately 18.73 per cent. Sand Grove indicated to Medco that it would not be willing to support an offer at 55 pence per Scheme share. Following further discussions between the advisers to Medco and Sand Grove, Sand Grove agreed to provide an irrevocable undertaking to vote in favour of the Scheme on the basis that the price offered under the Scheme was increased to 57.5 pence per Scheme share.

14. On 20 March 2019 the boards of the Company and Medco then announced that they had agreed an increase in the consideration to be offered under the Scheme to 57.5 pence per share. The Company also announced that following discussions between Coro and Sand Grove, and in light of the increased offer from Medco, Coro had confirmed to the Company that Coro did not intend to make a rival offer to acquire the Company.

The Court meeting

15. The Court meeting to vote on the Scheme took place on 25 March 2019. There was a single class of Scheme shareholders and the resolution to approve the Scheme was proposed on the basis of the increased price of 57.5 pence per Scheme share. In accordance with ICC Judge Barber's order, some institutional holders of Scheme shares were permitted to vote both for and against the resolution in respect of shares held for different beneficial interests.

16. Of the 170 Scheme shareholders who participated in the Court meeting, 139 voted in favour of the Scheme, holding 388,474,214 Scheme shares. 46 Scheme shareholders voted against the Scheme holding 45,049,646 Scheme shares. The majority in favour of the Scheme was therefore 81.76 per cent in number representing 89.61 per cent in value. The turnout at the meeting was 15.4 per cent in number and 61.24 per cent in value of Scheme shareholders.

The approach to sanction

17. The function of the Court at a hearing to sanction a scheme of arrangement is well known and is encapsulated in the following passage in *Buckley on the Companies Acts* at paragraph 219:

> "Sanction of the Court
>
> Once the meetings have approved the scheme, the sanction of the court must be sought. The sanction of the court is not a formality. The court has an unfettered discretion as to whether or not to sanction the scheme, but it is likely to do so, so long as (1) the provisions of the statute have been complied with, (2) the class is 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 interests adverse to those of the class whom they purport to represent, and (3) that the arrangement is such as 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 either 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 it is empowered to bind or some blot is found in the scheme, or if the Chairman did not conduct the meeting substantially in accordance with the procedure laid down by the court."

18. More recently, in Re TDG plc [2009] 1 BCLC 445 at [29], Morgan J suggested that there were four matters which required attention when considering whether to sanction any proposed scheme of arrangement. Those matters were as follows:

> "(i) The Court must be satisfied that the provisions of the statute have been complied with.
>
> (ii) It must be satisfied that in relation to the class of shareholders, the subject of the court meeting, was fairly represented by those who attended the meeting, and the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.
>
> (iii) An intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.
>
> (iv) There must be no blot on the scheme."

19. Applying these tests, subject to the point that I shall mention below, there is plainly no reason for me to refuse to sanction the Scheme. The statutory majority was obtained at the Court meeting at which the turnout, though low in absolute terms, was within the norms for takeover schemes of this type; there is no reason for me to suspect that the meeting was unrepresentative or that the majority were acting in any way improperly; the Scheme offers a premium to the undisturbed share price and was recommended by the board who were advised by competent advisers that it was in the interests of the members of the Company; and there is no defect that I can detect in the Scheme.

20. In the exercise of my discretion to sanction the Scheme I also derive some comfort from the fact that the consideration of 57.5 pence per Scheme share payable under the Scheme is the result of some element of competitive tension. As I have indicated, that price was raised following tentative interest from two other parties, both of which decided not to proceed. When taken together with the facts that the Medco offer is significantly in excess of the recent market price for the Company's shares, and that the board was advised by well-known and reputable advisers, this suggests that the increased price payable under the Scheme is a favourable one that a shareholder could reasonably consider to be in its interests.

A challenge to the adequacy of the Explanatory Statement

21. The main issue that has been raised is whether the Explanatory Statement provided to members of the Company under section 897 of the Act was in some way inadequate or defective.

22. The basic requirement is that an explanatory statement must be circulated to the members or creditors affected by a scheme, and that it must contain all the information necessary to enable such members or creditors to form a reasonable judgment on whether the scheme is in their interests or not, and hence how to vote: see e.g. Re Dorman Long & Co. Limited [1934] Ch 635 at 657; and Re Heron International [1994] 1 BCLC 667 at 672. The extent of the information required to be supplied will of course

depend upon the facts of the particular case. But the process under Part 26 of the Act depends upon full and accurate information being provided to those who are to vote upon the scheme, so that if the members or creditors have been provided with materially inaccurate, incomplete or otherwise inadequate information, the Court will most likely not be able to place any reliance upon, or give effect to, an affirmative vote at the Court meeting.

23. In the instant case, this issue arises because of correspondence between the Company and one of its larger institutional shareholders, Legal & General Investment Management ("LGIM") which has had a significant shareholding in the Company since about 2012. LGIM held about 40 million shares at the end of 2018, about 31.5 million shares at the voting record time for the Court meeting, and about 24 million shares on 15 May 2019. The price of the Company's shares has declined significantly during LGIM's time as a shareholder. Although reaching a high of 554.3 pence per share in 2012, it fell to 268.3 pence per share in June 2014, and declined to only 33.2 pence per share on 28 December 2018.

24. The substantial decline in the value of the Company's share price has not impressed LGIM. The Company has had a significant number of discussions with LGIM over the course of its investment in relation to a number of decisions taken by the board of the Company. LGIM has indicated to the Company and its financial advisers on a number of occasions LGIM's views on the Company, its assets and prospects, which have differed significantly from those of the directors. The Company's evidence describes LGIM as having expressed its "frustration, disappointment and anger" over the Company's performance in recent years, and indicates that LGIM has expressed a preference for any offer for the Company to involve share consideration.

25. After publication of the Explanatory Statement on 1 March 2019, on 8 March 2019, the Company received a letter from Mr. Nick Stansbury, Head of Commodity Research and Mr. David Patt, Senior Analyst, Corporate Governance at LGIM. The letter raised concerns regarding the conduct and decision-making process adopted by the directors of the Company to maximise shareholder value. The letter also expressed the view that in LGIM's opinion, the conduct of the directors (other than Adel Chaouch) had been so significantly below reasonable expectations that they were unsuitable to serve as directors of any public company. The letter reserved the right of LGIM to pursue legal action.

26. Shortly before the Court meeting, Mr. Stansbury sent a further email to the Company on 21 March 2019, asking whether the numerosity test still applied in schemes and then posing the following question,

> "… in theory, if a shareholder can demonstrate that there is reasonable cause for doubt that all necessary information has been disclosed to shareholders to make an informed decision, is there any precedent for successfully challenging the scheme before court that you are aware of?"

27. Both the Company's financial advisers, Morgan Stanley, and its solicitors, Linklaters LLP, responded immediately on 21 March 2019 inviting Mr. Stansbury to let them know if he had any concerns about the disclosure of information. Mr. Stansbury did not respond other than to notify Morgan Stanley later that day that LGIM had voted the vast majority of its shares against the Scheme proposal. LGIM also did not send a representative to the Court meeting to ask questions or otherwise raise any specific questions as to the adequacy of the Explanatory Statement.

28. However, after the Court meeting had voted in favour of the Scheme on 25 March 2019, and almost two further months had passed, three days before the sanction hearing, Mr. Stansbury sent a further email to the Company and its advisers on 14 May 2019 stating as follows,

> "LGIM have carefully evaluated our position as regards formal opposition to the proposed scheme sanction this Friday. We have regretfully concluded that because of the asymmetry of information between us as investors and you and your colleagues as board directors, the probability of successfully opposing scheme sanction is very low. Therefore after seeking counsel from our internal legal team, we will not be making an application seeking to oppose.
>
> But we remind you and the rest of the board that both we reserve the right to pursue, and will be proactively investigating, any further possible action should more information come to light.
>
> To that end we wish to place on record with you as a board, and your advisers, the reason for our opposition. Specifically, the reasons why we believe that shareholders have not been given all of the necessary information to make a balanced assessment of the fairness of this offer from Medco.
>
> 1) we believe shareholders should have been given a detailed presentation on the longer term upside potential from the south-east Asian assets (which we note we repeatedly requested of the board before the offer from Medco came to light)
>
> 2) a balanced detailed view of the long-term implications of the (non-commercial) discovery in Mexico
>
> 3) a detailed analysis of the likely commercial value to be realised in Tanzania
>
> 4) details of what activity the board had undertaken to seek to establish potential value to be realised from other non-core assets of the company including any intellectual property relating to the cancelled Fortuna project and any potential value from UK tax assets.

> In addition it remains our opinion that the board of directors of Ophir have failed to meet our expectations on what they should have done to maximise value for shareholders…
>
> The combination of these factors in our opinion placed us and other investors in a position where it was extremely challenging to reach a proper, balanced and informed decision on the value offered to them by the Medco proposal."

29. Consistent with this email, LGIM did not attend the hearing before me to oppose the sanction of the Scheme or otherwise communicate its concerns to the Court.

30. In addition to putting this correspondence with LGIM before me in discharge of its duty of full and frank disclosure, the Company sought to address the points raised by LGIM in its evidence. In particular, the Interim Chief Executive Officer of the Company, Mr. Alan Booth, referred to LGIM's email of 14 May 2019 and stated,

> "When considering whether to recommend the [takeover] … the directors of the Company considered the Company's internal models and valuations of the Company and all of its assets, their prospects, any uncertainties affecting the assets, macro and micro market conditions, any uncertainties in the jurisdictions involved and the Company's ability to monetise potential value in the short and long term. This included consideration of the items referred to by Mr. Stansbury in South East Asia, Tanzania, Equatorial Guinea and Mexico (save for the sub-commercial drilling result in Mexico which occurred after the date of the Scheme Document) …"

31. As Mr. Thornton accepted, however, no specific reference was made in the Explanatory Statement to any of the matters referred to by Mr. Stansbury. Moreover, the fact that the board of directors might have considered the issues raised does not directly address the suggestion that such matters should have been explained to shareholders so that they could independently form their own view of whether to vote in accordance with the recommendation of the board.

Analysis

32. The suggestion from a reputable institutional investor which has been following the Company for some years that the information provided to members in connection with the Scheme was inadequate is obviously a matter of some concern. The difficulty for the Court, however, is that in the absence of LGIM appearing to raise its concerns with the Court and to explain the detailed background to the points which it has made, it is impossible for the Court to form a judgment as to whether or not the matters identified by LGIM are material matters that could and should have been dealt differently in the Explanatory Statement.

33. In that respect, LGIM's reasons for not appearing at the hearing, as expressed at the start of the email of 14 May 2019, do not bear close scrutiny. The email suggests that, "because of the asymmetry of information between us as investors and you and your colleagues as board directors, the probability of successful opposing sanction is very low". That seems to me to be misconceived. To answer the question posed in LGIM's earlier email of 21 March 2019, if there is reasonable cause to doubt that all necessary information has been disclosed to shareholders to enable them to make an informed decision in relation to a scheme, I think that the Court would have power to require the scheme company to give disclosure (if necessary subject to appropriate safeguards to preserve commercial confidentiality), of documents or information in relation to the relevant issues to members who wish to oppose the scheme; or at very least the Court could require the matters raised to be addressed directly in evidence from the company to enable it to form a view as to whether the explanatory statement had been adequate. That occurred, for example, in the Heron Group case (supra). The mere fact that, absent such an order for disclosure or additional evidence, there might be an "asymmetry of information" of the type to which LGIM referred, is therefore not a basis for concluding that the prospects for successfully opposing the Scheme would be low.

34. Moreover, when assessing the weight to be attached to the views expressed by LGIM, I also have in mind the points urged upon me by Mr. Thornton. He pointed out, first, that LGIM would have received the Explanatory Statement on or shortly after 1 March 2019, but waited almost three weeks until 21 March 2019, shortly before the Court meeting on 25 March 2019, to raise, obliquely, the issue of the adequacy of the information provided to shareholders. At that stage, LGIM was clearly invited to identify its concerns to the Company and its advisers. Had it done so, the Company could have taken steps, if it thought there was anything in the concerns, to deal with them by way, for example, of seeking the permission of the Court to adjourn the Court meeting and to circulate a supplementary or corrective Explanatory Statement. But LGIM chose not to do so. It also did not attend the Court meeting at which it could have raised any issues that genuinely concerned it.

35. Mr. Thornton submitted that this failure by LGIM to raise its concerns at an earlier stage when something could have been done, but instead to send a relatively vague letter at the last minute before the sanction hearing, was not indicative of a genuine concern on the part of LGIM as to the adequacy of the Explanatory Statement. Instead, he said, it had all the hallmarks of a late spoiling tactic by a party which has had a long-running disagreement with the Company's directors, which is dissatisfied as to how its investment in the Company has turned out, and which had searched through the Explanatory Statement to find things to complain about to fuel its campaign and cast the Company's management in a generally unfavourable light.

36. I also note, as Mr. Thornton emphasised, that although voicing its opposition, the LGIM email did not actually suggest that the Scheme should not be sanctioned or that the sanction hearing should be adjourned for further evidence or consideration.

37. The allegations made by LGIM are strongly denied by the directors, and I have no means of knowing where the truth of the matter lies as between them. Nor can I investigate the reasons for the Company's decline. Such matters are not for me to resolve in considering whether to sanction the Scheme. I am, however, inclined to agree with Mr. Thornton's submissions as regards LGIM's approach to the Explanatory Statement.

38. In this context I would reiterate some observations of Hildyard J in Stronghold Insurance Company Limited [2018] EWHC 2909 (Ch). Although made in the context of a convening hearing on a creditors' scheme, the underlying thrust of the points made is equally applicable in the instant situation. Hildyard J said,

> "142. I have experienced a growing tendency for [opposing] creditors to purport to reserve their position by floating or trailing generic points without proper explanation, elaboration or evidential base, often with the expressed expectation of returning to their points (or some of them) in the future (usually the Sanction stage) …
>
> 143. This developing tendency places a growing burden, not only on the Company (which has an obligation to do its best to address and deal candidly with points of substance going to the court's jurisdiction or likely to affect its proper exercise), but also on the court, which is obliged to sift through disparate and sometimes undeveloped points without proper assistance.
>
> 144. Furthermore, even in the case of creditors with comfortably the financial wherewithal to fund appropriate representation … this tendency is accompanied by an apparent reluctance or disinclination to arrange to be represented at the … hearing. That tends to increase, not decrease, the burden on the court, which will often (almost invariably, in my own experience) be assisted by properly focused oral argument."

39. Hildyard J went on to make a further point in relation to costs which I would also endorse as applicable in the context of a sanction hearing. Although concerns over costs were not cited by LGIM as a reason that it chose not to appear at the hearing before me, it is worth reiterating that parties who have genuine issues to raise as to the adequacy of the information provided to members or creditors should not be deterred from appearing at a sanction hearing by concerns over costs. Hildyard J stated,

> "145. In case this reluctance or disinclination [to appear at the court hearing] is the result of concerns that attendance may trigger some exposure to costs, I would wish to make clear my understanding (and certainly my own usual practice) that, unless the objections are wholly improper or irrelevant, obviously collaterally motivated, or sprung on the scheme company without affording a proper opportunity for their discussion, there is very little likelihood of any adverse order for costs at that stage; and indeed there will usually be a real prospect of the relevant creditor recovering its reasonable costs of helpful and focused representation, fairly outlined in good time before the convening hearing to enable their proper consideration, on the class issues raised."

40. Taking these points on board, I find it difficult to believe that, as a well-resourced entity with the benefit of legal advice, LGIM would not have raised its points earlier, and in more detail, if it had any genuine concerns about the level of disclosure in the Explanatory Statement. The process adopted in relation to this Scheme provided any party who was concerned about the adequacy of the information with the opportunity to raise those concerns both with the Company and ultimately with the Court in a timely and focussed manner. LGIM chose not to take advantage of those opportunities, but instead engaged in sniping at the Explanatory Statement from the sidelines at the last minute. In these circumstances I am unable to place any weight on the points which LGIM raised in correspondence, and I am not persuaded by them to withhold my sanction for the Scheme.

Mexico

41. The final point which Mr. Thornton very properly raised as a matter of full and frank disclosure relates to a transaction very recently entered into by the Company to sell its 23.33% interest in Block 5 offshore Mexico for a cash consideration of $35 million, which is in excess of the book value of that interest in the Company's accounts. The exchange of contracts was announced by the Company on 16 May 2019, the day before the sanction hearing.

42. The fact that there were discussions underway for such a sale of Block 5 offshore Mexico was not referred to in the Explanatory Statement, but it would seem to be at least consistent with a reference in the Explanatory Statement under the heading 2018 Strategic Update that,

> "Ophir is in negotiations to rationalise parts of its frontier exploration portfolio with the potential to generate cash and reduce Ophir's future exploration capital commitments and further improve its liquidity position."

43. The discussions to sell Block 5 were, however, referred to in the announcement of the Company's 2018 Financial Results on 12 March 2019. Although the intention to sell Block 5 were presumably known to LGIM through such an announcement, the possibility of a sale of Block 5 was not one of the matters of concern identified by LGIM.

44. Accordingly, the fact that the sale of Block 5 has now been agreed does not strike me as a material adverse change or occurrence since the Court meeting that would give me concern that members might have taken a different view of the Scheme if they had known of it. Hence I do not consider that it is necessary to reconvene the Court meeting for a second vote.

Conclusion

45. For these reasons, and on the giving by Bidco of the appropriate undertakings to be bound by and give effect to the Scheme, I shall sanction the Scheme.