IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS C
AND WALES
COMPANIES COURT (ChD)
Neutral Citation: [2019] EWHC 2532 (Ch)

No. CR-2019-004293

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 26 July 2019

IN THE MATTER OF **NN2 NEWCO LIMITED**
A N D
IN THE MATTER OF **THE COMPANIES ACT 2006**

Before:

MR JUSTICE NORRIS

B E T W E E N :

NN2 NEWCO LIMITED — Applicants

MR D. BAYFIELD QC and MS PETERS and MS PYPER (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Applicants.

J U D G M E N T

MR JUSTICE NORRIS:

1 The background to the NN2 Newco Limited Scheme and its essential terms are set out in the judgment ([2019] EWHC 1917 (Ch)) which I handed down explaining my reasons for ordering the convening of two scheme meetings. This judgment on the hearing of the sanction application may be regarded as supplemental to that convening judgment, so I shall not repeat any of the material relating to that background or those essential terms.

2 The function of this sanction hearing is, therefore, in essence, to see how issues that did not cause a fracturing of the class impact upon a consideration of the fairness of the outcome of the scheme meetings.

3 In bare outline, the purpose of the scheme was the reduction in the principal debt of some €1.1 billion and the provision of new capital as part and parcel of an overall restructuring which includes the transfer of ownership to Trafigura

4 I can refer to two small matters which arise before I turn to deal with the main point of the sanction hearing. First, I can record that one of the preconditions to the implementation of the scheme has now been satisfied because the Australian Foreign Investment Review Board has approved the issue of a 98 per cent shareholding in NN2 to Trafigura. This is part of the broader restructuring but a condition that needed to be satisfied before implementation of the scheme. Secondly, I can record that as a result of further investigation the number of English domiciled creditors affected by the scheme has been slightly reduced (a matter I had to consider in the context of the applicability of "the Article 8 argument"); but the reduction is small and is not material to the conclusions which I expressed upon consideration of that argument.

5 The order for the convening of the meetings was dated 4 July 2019. Notice of the meetings to be convened was sent out on 5 July. Notices of the meetings, together with the relevant voting forms, a copy of the scheme and of the explanatory statement were provided to all scheme creditors. They were sent to Euroclear and Clearstream for distribution to the holders of Existing Notes via the respective clearing systems and to The National Bank of Belgium for distribution to the holders of the Existing Bonds. As will appear, there is some small complaint about the manner of communication to *shareholders*, but I will address that in its place.

6 The meetings were convened on 22 July 2019. The meeting of the holders of the Existing Notes was informed of a letter sent by COMIMET (the holder of Existing Notes representing 0.01 per cent of the relevant class of Notes) seeking an adjournment of the meeting. The letter was considered by the chair of the meeting, who decided to proceed with the meeting. The meeting consisted of the chairman and one other proxyholder: but between them they represented 281 scheme creditors representing 95.61 per cent by value of the Existing Notes.

7 Of the 281 scheme creditors represented at the meeting, 278 voted in favour of the proposal and 3 against. The 278 holders of Existing Notes who voted in favour of the scheme represented 98.93 per cent by number (and 99.96 per cent by value) of those present and voting. They represented 95.57 per cent by value of all holders of Existing Notes.

8 At the meeting of the holders of Existing Bonds, 23 holders were represented at the meeting. They constituted 98.87 per cent by value of all holders of the Existing Bonds. One hundred

per cent by number and by value voted in favour of the scheme. Accordingly, the scheme was approved by way of the excess of the appropriate majorities.

9 I have referred in the report of each class not only to the proportions of votes cast by those attending or represented at the meeting, but also to representation "by value" of the entire class. That is because the entire "value" is known. It is not possible accurately to compute the representation by head count as a proportion of the total population of Existing Noteholders or Existing Bondholders because (by virtue of the way the securities are held) the total population cannot be known. But the calculations by value show that those attending were a more than fair representation.

10 The approach of the court to sanction is well-established. I see no need at this stage for an extensive citation of the authorities underlying it. It is sufficient to refer, since this judgment may be considered elsewhere, to a recent summary of the principles by Snowden J in *Re the Noble Group* [2018] EWHC 2092, 17. I should for clarity's sake, however, make one overarching point. The court, in conducting the sanction hearing, does not operate as a rubber stamp. It must reach its own independent view. But in doing so, it naturally has proper regard to the views of the scheme members, whom it regards as the best judges of their own commercial interests. On the other hand, the fact that at the sanction hearing there is no opposition presented to the scheme does not relieve the court of the burden of scrutiny.

11 It is with that overarching point in mind that I have considered the submissions of Mr Bayfield QC, who seeks and order sanctioning he scheme. I can highlight the relevant considerations by making a number of specific findings and holdings.

12 First, I am satisfied that the proposed scheme is plainly an "arrangement" within Part 26 of the Act.

13 Second, I am satisfied that the statutory provisions set out in Part 26 of the Act have been complied with.

14 Third, having ruled on the convening hearing, I remain satisfied that the Court meeting was correctly constituted. I see no reason to revisit any of the conclusions I reached in the convening judgment.

15 Fourth, I am satisfied that at the scheme meetings the proposal was approved by the requisite majorities in each case. There was, in fact, actual or virtual unanimity. As I have noted, there were three existing noteholders who objected to the scheme and one of those has continued his objection, to which I will later refer. But there was overwhelming support for the proposal.

16 Fifth, I am satisfied (as I have indicated) that the scheme noteholders and bondholders were fairly represented by those attending the scheme meeting. Indeed, it can be seen that there was a massive representation. One of the issues which falls for consideration, even in a case when there is such massive representation, is whether those attending and voting have some special interest which they are seeking to promote by their attendance and their voting so that they cannot be taken fairly to represent the class whose interests are to be compromised by means of the scheme. The Court must be satisfied that those attending were acting *bona fide* and were not seeking to coerce a minority in order to promote some interest which is actually adverse to the interests of the class as a whole. It might be thought that the sheer volume of attendance and the sheer margin of the majority would mean that this question

need not receive any further attention. But I have been specifically addressed by reference to particular benefits which some members of the class obtain under the scheme, in particular, the "work fee" and the "consent fee" to which I referred in the convening judgment to which reference should be made.

17 In fact, in relation to the "work fee", of those attending the meeting who were holders of Existing Notes but were *not* entitled to the "work fee", 98.88 per cent by number and 99.92 per cent by value voted in favour of the scheme. Of those attending the meeting of the holders of the Existing Bonds but were *not* entitled to the "work fee", every one of them voted in favour of the scheme.

18 As to the "consent fee", of those attending the meeting of the holders of Existing Notes but who were *not* entitled to the consent fee, 94.85 per cent by number and 99.46 per cent by value voted in favour of the scheme. And of those attending the meetings of the holders of Existing Bonds but who were *not* entitled to participate in the "consent fee", 99.12 per cent by value voted to support the scheme. It can therefore be seen that neither the "work fee" nor the "consent fee" had any bearing on the way that people voted. So, not only did the existence of such provisions not fracture the class, it has no bearing at all upon the ultimate outcome of the meetings so held. So, I am therefore satisfied that those attending and voting at the meetings fairly represented the class interests.

19 Sixth, I am satisfied that the scheme is a fair one in the sense that it is one which might properly be entered into by an ordinary class member addressing the issues to be addressed from the standpoint of his ordinary class interests. The point really needs no elaboration in this case. The alternative to the scheme was some form of insolvency. That insolvency stood to yield to the holder of an interest in the company between 0.9 per cent and 11.6 per cent of the value of the debt interest held. By contrast, under the scheme a return of

something between 43 per cent and 51 per cent is to be expected. Plainly, an honest and reasonable class member could support such a proposal.

20 Seventh, I must consider whether there is some "blot" on the scheme, something which stands in the way of its implementation. It is perhaps under this head that one can address the issue of effectiveness.

21 For the reasons explained in the convening judgment, the scheme was facilitated by the incorporation of an English company and by the utilisation of amendment provisions in each of the debt instruments to convert the governing law of the debt to English law. But there is always the sneaking concern that because the governing law used to be something different, in particular, New York law, and there remain New York domiciled creditors, the scheme might not be regarded as effective. To that end, it is intended to present a petition in New York seeking Chapter 15 relief. I have received the expert opinion of the Honourable James Peck, a former judge of the Bankruptcy Court of the Southern District of New York, expressing the view that upon the hearing of that application for Chapter 15 relief it is likely that the English scheme will be recognised as a foreign "main proceeding" for the purposes of recognition and enforcement of the scheme in New York. It is a condition of the restructuring, but not of the scheme itself, that such relief be obtained.

22 That condition is, in fact, waivable, and I have been addressed upon the question whether the broader restructuring may properly contain the provision of that nature. I was invited to consider the judgment of David Richards J in *Re Magyar Telecom BV* [2013] EWHC 3800 in which the same point arose (see para.[26] of his judgment). I am content to adopt his reasoning with which I respectfully agree. He, too, was faced with a scheme, part of which would not be effective unless the company obtained recognition under Chapter 15. In his scheme, too, this condition could be waived. He considered that the fact that the provision

could be waived was not material. He pointed out that in his case, as in mine, the level of support for the scheme and the very high percentage of note creditors who had signed the securities confirmation form as a necessary precondition to receiving their entitlements indicated that the scheme would very largely achieve its purpose, irrespective of whether Chapter 15 relief was, in fact, obtained.

23 I am therefore satisfied, subject to consideration of the objection, that all of the conditions necessary for the Court to consider sanction are favourably met.

24 There is, however, one persistent objector to the scheme. I indicated at the convening meeting that I had received a communication from COMIMET, through their agent Monsieur de Barsy, objecting to the granting of an order convening the meeting. I have indicated in the course of this judgment that Monsieur de Barsy sought an adjournment of the Court meeting. He has now written directly to the Court, objecting to the Court granting sanction. Upon examination, it seems that the objection may be based upon a misunderstanding or a misconception as to the way COMIMET's votes have been treated in the past and as to its entitlements under the scheme. But I will nonetheless address the objection.

25 The essence of the objection is (i) that COMIMET thinks it has encountered difficulties in the preservation of its rights to vote against the scheme without undue penalty; and (ii) COMIMET does not consider that the process leading to the voting was fair and it does not consider that there was proper disclosure of what it thinks are material facts relating to the scheme.

26 COMIMET's belief that it is being "penalised" seems to arise out of the "account holder's letter" which it is asked to sign. The "account holder's letter" contains a number of parts. One part relates to how the vote in relation to the scheme is to be cast. Another part relates to establishing entitlement to receive the scheme consideration. COMIMET completed the first part relating to the casting of its vote against the scheme, but it did not complete the second part for fear that if it gave details enabling the scheme consideration to be paid to it that would, in some sense, devalue its vote against the scheme. The position was clearly explained well before the scheme meeting occurred. It was pointed out to COMIMET (i) that M de Barsy had completed that part of the "account holder's letter" which enabled COMIMET's vote to be cast against the scheme; (ii) that he had not completed that part of the account holder's letter which enable the scheme consideration to be paid to it; but (iii) that that did not mean that COMIMET would not receive the scheme consideration, it meant only that COMIMET's share of the scheme consideration would be held in a holding trust until such time as COMIMET chose to complete a claim for the scheme consideration. However, COMIMET has understood that communication to mean that it is, to quote from its letter of 25 July, "constrained to change our mind in order not to be penalised in the settlement of the scheme".

27 COMIMET's second ground of objection is its belief that some information is being held back, which information it requires in order to protect its own interest. It thinks that the events which triggered the process of re-financing the illiquidity of Nyrstar is in some sense contrived and has been brought about by Trafigura (a main customer of , a minority shareholder in and provider of finance to Nyrstar). In fact, a lot of detail about the relationship between Nyrstar and Trafigura, the role played by Mr Konig, the Independent Chairman of Nyrstar, and other matters of concern to COMIMET is provided in the "Answers to Frequently Asked Questions" that were made available to scheme creditors.

28 Such matters were also addressed in a report prepared under Article 524 of the Belgian Companies Code on a voluntary basis (a report by independent directors not, in fact, being required in the instant case). They were also the subject of analysis by KPMG in the course of the scheme preparation.

29 None of this satisfies COMIMET. In particular, it does not satisfy COMIMET's concern that the ultimate outcome of the restructuring should be (as it transparently is) a takeover of Nyrstar by Trafigura.

30 I had the opportunity to consider the letter that M. de Barsy wrote on behalf of COMIMET to the judge hearing the sanction application. I have also had the advantage of being taken through the entirety of the correspondence with M. de Barsy following the convening of the scheme meetings. One can do little, I fear, to satisfy COMIMET's objections.

31 In my judgment, there was full disclosure of all relevant considerations at an appropriate level of detail to those who would have to vote on the scheme. It may well be that individual scheme members had individual lines of enquiry that they would want to pursue. But the remedy in the hands of such scheme creditors is to raise the issue at the scheme meetings, as COMIMET attempted to do when writing to the Chairman of the scheme meeting, and by making submissions to the court. In my judgment it is the view of the properly informed and properly constituted majority that must prevail over the individual concerns of a particularly anxious creditor.

32 Upon consideration, I am satisfied that COMIMET's communications do not raise any concern as regards the oppression of a minority or as regards the fundamental fairness of the scheme in the interests of the creditors as a whole. I therefore do not regard the objection as

placing any “roadblock” in the way of sanction and I grant sanction. I will make an order in the form sought.

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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

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