Case No: CR-2019-002174

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGALND AND WALES
COMPANIES COURT
Neutral Citation: [2020] EWHC 776 (Ch)

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

Date: 03/04/2020

Before:

SIR ALISTAIR NORRIS

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IN THE MATTER OF INMARSAT PLC

And

IN THE MATTER OF THE COMPANIES ACT 2006

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- -

Mr Michael Todd QC and Mr Andrew Thornton (instructed by **Clifford Chance**) for Inmarsat plc
Mr James Potts QC (instructed by **Kirkland and Ellis International LLP**) for Connect Bidco Ltd
Mr David Chivers QC and Mr Stephen Horan (instructed by **Herbert Smith Freehills LLP**) for Oaktree Value Opportunities LP and Oaktree Capital Management LP
Mr Martin Moore QC and Mr Ben Griffiths for Kite Lake Capital Management LLP and Rubric Capital Management LP

Hearing date/written submissions: 4,5 and 6 December 2019

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APPROVED JUDGMENT

This Judgment was handed down by circulation to the parties' representatives by email and by release to Bailii. It was not handed down in court due to the present COVID19/coronavirus pandemic. The deemed time for hand-down is 2.00pm on 3 April 2020.

Sir Alastair Norris:

1. This judgment deals with the costs of the Part 8 Claim brought by Inmarsat plc ("the Company") seeking approval of the scheme of arrangement by means of which it was acquired by Connect Bidco Ltd ("Bidco"). I approved the scheme on 3 December 2019 for reasons given the following day (the citation to which is [2019] EWHC 3470 (Ch)). The avoid repetition, this judgment proceeds on the footing that the reader is familiar with that sanction judgment.

2. The grant of sanction was originally opposed by Oaktree Value Opportunities LP and Oaktree Capital Management LP ("Oaktree"), who instructed Leading Counsel to appear at the sanction hearing to argue against the immediate grant of sanction; and also by Kite Lake Capital Management LLP and Rubric Capital Management LP ("Kite Lake/Rubric") who did likewise. (I will refer to Oaktree and Kite Lake/Rubric together as "the Objectors"). Each submitted skeleton arguments setting out the grounds of opposition. In essence those grounds were

    i) That the Company's explanatory statement preceding the scheme meeting had inadequately dealt with the Ligado contract and its potential upside;

    ii) That recent press reports had suggested that that upside might immediately be realised because a hearing to approve the "re-purposing" of the "L-band" spectrum over which Ligado held rights derived from the Company was imminent;

    iii) That the process of sanction should be delayed for as long as possible to see if the re-purposing was approved;

    iv) That before sanction was given the scheme shareholders should be given the chance to consider both additional material explaining how the Ligado contract had been taken into account in the recommendation of Bidco's offer and the "change in circumstance";

    v) That a further shareholder meeting could be avoided if Bidco agreed to revise its offer to include a "contingent value right" ("CVR") under which any "upside" derived from the "repurposing" of Ligado's spectrum rights would be shared with the Company's shareholders notwithstanding the acquisition of the Company by Bidco.

    But on the morning of the sanction hearing this opposition was withdrawn and both Oaktree and Kite Lake/Rubric supported the grant of sanction, uniting in the submission that none of their objections had touched upon the Court's jurisdiction to sanction the scheme (as not being one approved at a properly convened and properly informed meeting) and all had been directed at how the Court should exercise its discretion.

3. This withdrawal of objection had been brought about because at 7.30am on 2 December 2019 Bidco made an announcement that it was not prepared to extend the long-stop date

in the scheme (which was 10 December 2019) nor was it prepared to offer a CVR or to increase its offer. Successful opposition would thus mean that the scheme would lapse, and the shareholders would lose the 43% premium over the undisturbed share price which Bidco offered and the statutory majority had accepted.

4. So far as Oaktree is concerned the position was spelt out in this way: -

> "Mr Chivers QC: Oaktree's position has been consistent throughout, that the sanction hearing should be delayed for as long as possible, consistent with the longstop. Subject to that, the scheme should go back to shareholders for their approval or that a CVR should be negotiated so as to render that approval unnecessary. Oaktree has never said that the scheme should not be sanctioned altogether. But the practical impossibility now…
>
> Judge: Can I just ask, has Oaktree ever said that no reasonable shareholder, having regard to his own interests as a shareholder, could reasonably approve the scheme as it originally stood?
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> Mr Chivers QC: No.
>
> Judge: So, the contingent value right was all about improving the terms of the scheme that had been negotiated and would be acceptable to a reasonable shareholder, looking after his own interests?
>
> Mr Chivers QC: My Lord, that's right. It has to be looked at in the context of the criticisms that Oaktree have made of the disclosure in the first place. But, my Lord, that is right…… [M]atters that were the subject of the request, a further shareholder vote or a CVR, are no longer possible. So, we find ourselves in the position where, for purely commercial reasons, and these are reasons that are not peculiar to Oaktree, these are reasons that apply to all shareholders, the matters that we asked the company to put in place can no longer be put in place. So, the matters that we were going to ask the court, last week, to hold up the scheme approval for, not to refuse approval but to hold up approval, those matters can no longer be asked for. They are simply not on any commercially rational shopping list. That leaves us where we are today, withdrawing our objection to the scheme because that is the inevitable outcome of the process that has happened…."

5. It was not suggested by Mr Moore QC that the position of Kite Lake/Rubric was materially different.

6. Counsel for the Company and for Bidco both submitted that it was appropriate that Oaktree and Kite Lake/Rubric should be ordered to pay to the Company and to Bidco

the additional costs incurred by them respectively in responding to opposition that was ultimately abandoned and was directed at increasing an offer that was itself sufficient.

7. Counsel for Oaktree and for Kite Lake/Rubric both submitted that it was appropriate that the Company should pay their costs of raising the grounds of opposition which, although not pursued, were raised for the assistance of the Court.

8. It is right to begin with first principles. The starting point for an order about costs is CPR 44.2(1), which confers the discretion. CPR 44.2(2) contains the general rule about how that discretion will be exercised (by reference to who is "the unsuccessful party" and who is "the successful party") but confirms that the Court may make a different order. CPR 44.2(4) and (5) list in a non-exhaustive way some of the material considerations that might lead to a different order. Orders about costs in relation to schemes are subject to this regime.

9. The "general rule" will ordinarily have no application to Part 8 proceedings seeking the court's approval of a scheme: note that I say nothing about individual applications within such proceedings. The Part 8 proceedings seek the approval of the Court, not a remedy against another "party"; Re Royal & Sun Alliance [2006] EWHC 2947 per David Richards J at [23]. Save in relation to the company itself it is not meaningful to speak of an "unsuccessful party". Such proceedings are likely to lead to "a different order". Indeed, there are very many instances in which the Court has done so; so many that it is said that there have emerged "rules" which govern the position.

10. An analogous position arises where the Court is asked to admit a will to probate: in that context in Re Kostic [2007] EWHC 2909 Henderson J (as he then was) said that whilst costs orders were governed by the CPR, the considerations of policy and fairness which underlay the existing "rules" about costs remained as valid today as they were before the introduction of the CPR and should continue to guide the Court in deciding what "different order" to make, acting as guidelines not straitjackets: see paragraphs [4] and [6]. In Re Peninsular & Orient [2006] EWHC 3279 Warren J had made the same point in relation to the "special rules" that had emerged in the scheme context: see para. [3]. It is in my judgment the correct approach to costs in relation to schemes of arrangement.

11. The position set out in *Buckley on the Companies Acts* at para [16-245] is: -

> "Where opposition to the sanction by the court of the scheme of arrangement fails, but it was not frivolous, it is the practice of the court on application under this section to order the successful applicant to pay the costs of the unsuccessful opposing creditors or members if their arguments were of assistance to the court; or alternatively to make an [*presumably a misprint for "no"*] order as to costs. Ultimately the award of costs is a matter for the discretion of the court"

The "practice of the Court" is based upon the order made and reasons given in Re National Bank Ltd [1966] 1 WLR 819.

12. This practice was recently commented upon by Hildyard J in Re Stronghold Insurance Company Ltd [2018] EWHC 2909 (Ch) at paras [142]-[145]. The judge noted that on

applications to convene scheme meetings there was a growing tendency for opposing creditors to trail generic points in opposition without explanation, elaboration or evidential base with the expressed expectation of returning to these points at the sanction stage; and then not to be represented at the sanction hearing. The effect of this was to increase the burden on the court. Hildyard J continued (at [145]):-

> "In case this reluctance or disinclination [to appear at the court sanction 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 practice) that, unless the objections are wholly improper or irrelevant, obviously collaterally motivated, or sprung on the scheme company without affording 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 their proper consideration, on the class issues raised."

13. This observation was endorsed by Snowden J in Re Ophir Energy plc [2019] 1278 (Ch) who said (at para [39]):-

> "It is worth re-iterating 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."

14. Based upon those comments Mr Chivers QC submitted on behalf of Oaktree (supported by Mr Moore QC on behalf of Kite Lake/Rubric) that the Court had extended an open invitation to those who have genuine objections to a scheme to fully engage with the process, to instruct solicitors and Counsel and to appear at Court; and that objectors had been so invited on the basis that (i) that they would not be facing an adverse costs order and (ii) that there was a very real prospect of them getting an order in their favour.

15. The point of the observations of Hildyard and Snowden JJ (which I wholly endorse) was to emphasise that if objections are to made to a scheme then they should be fully articulated and properly argued and defended, and that the Court should not be left to assess, unassisted, the weight of (sometimes vague) criticisms in correspondence when called upon to scrutinise the scheme at the sanction stage. Neither of those experienced scheme judges would have intended their words to be taken as an encouragement to objection itself, or as providing a "tick box" list which (if met) would result in a particular order thereby introducing rigidity into the undoubted discretion as to costs (going beyond a "guideline"). I do not think that they intended to depart from the view expressed by Warren J in Re Pensinsular and Orient [2006] EWHC 3279 (Ch) at [47]:-

> "I decline to elevate to some great principle of public policy the idea that, save in exceptional cases, objectors must, in order to ensure proper scrutiny of a scheme, always be immune from the normal costs rules provided that their objections are

> genuine and not frivolous. It seems to me that, as in any other litigation, the courts are perfectly capable of deciding on a case by case basis, what the justice of the case demands in relation to costs".

16. That remark reflects the fact that a balance has to be struck between assisting the Court to discharge its scrutiny function on the one hand and on the other encouraging objection in the knowledge that the costs of doing so will be defrayed by others.

17. Concerning Oaktree, the relevant facts are these. Oaktree's business, at its core, is to buy securities based on fundamental research at a discount to intrinsic value. Oaktree began building a holding in Inmarsat in September 2018 because it thought the Inmarsat's core business had growth prospects and that its "L-band" spectrum was under-utilised and had potential. Prior to the announcement of the scheme Oaktree had built up a holding of 2.7 million shares. The scheme was announced on 25 March 2019. The scheme meetings were fixed for 10 May 2019. Between announcement and the scheme meeting Oaktree increased its holding to 3.17 million scheme shares. At the scheme meeting Oaktree voted against the scheme because it considered that the offer price (albeit at a 43% premium to the undisturbed share price) undervalued the company: but the scheme was approved. After the scheme meeting Oaktree increased its holding in Inmarsat to 13.23 million shares. It might have done so (i) because it bought at a discount to the offer price and hoped the scheme would be sanctioned (so yielding a profit equal to the discount); or (ii) because it hoped the scheme would be defeated and it would be left with a holding which would ultimately be valued above the offer price; or (iii) because it hoped to achieve an improvement on the offer price through use of the scheme dynamics (threatening to delay sanction unless a CVR was included).

18. In October 2019 Oaktree began actively to promote its opposition to the scheme. Its initial position (set out in a letter of 29 October 2019) was that

> "…the Takeover Offer materials contained materially inadequate disclosure with respect to Ligado… and that, as the Explanatory Statement was defective, the Court should not give effect to, or rely on, the vote at the Court meeting."

This challenge to the jurisdiction of the Court to sanction the scheme was subsequently softened. First, in its letter to Inmarsat of 5 November 2019 Oaktree said that it proposed to invite the court "to examine… very carefully" the disclosure questions (and also whether there had been a "material change" in the light of press speculation about the progress of Ligado's application to "repurpose" the "L-band"). Then, second, in its evidence filed on 20 November 2019 (which took into account the evidence filed by Inmarsat as to how it approached the Ligado contract and the "repurposing" when preparing the Explanatory Statement) Oaktree said that there should be a further shareholders meeting before sanction was considered. Finally, in the skeleton argument filed on its behalf Oaktree's position was spelt out as being that the scheme should go back to shareholders for reconsideration, but that such a necessity could be avoided if Inmarsat and Bidco were prepared to take steps to provide for the future uncertainty about the "L-band" approval by way of a CVR.

19. Concerning Kite Lake, the relevant facts are these. Kite Lake thought Inmarsat's exposure to Ligado was intriguing. There was an approach to take over Inmarsat by a prospective purchaser in July 2018. Kite Lake bought into (and subsequently sold out of) that bid situation through "contracts for difference" ("CFDs"). In March 2019 when the possibility of a new bid emerged Kite Lake again bought CFDs. At the time of the announcement it had CFDs relating to 1.7 million shares. By the date of the scheme meeting it had increased this and converted it into shares, so that Kite Lake held 2.6 million voting shares, which it used to support the scheme. It subsequently increased its holding via further CFDs. During October 2019 Kite Lake came to consider that approval for the "repurposing" of the "L-band" was approaching a key decision point, and it preferred not to rush the sanctioning of the scheme in view of what it regarded as "a material change" in the position presented to the shareholders at the scheme meeting.

20. Concerning Rubric, it first acquired an economic interest in Inmarsat through CFDs in April 2018 relating to 722,000 shares. By the date of the scheme circular this had increased to 8.25 million CFDs. Following conversion and some dealing, at the date of the scheme meeting Rubric held 4.42 million scheme shares beneficially (which it voted in favour of the scheme) and 1.02 million CFDs. Rubric viewed what it understood to be events concerning the "repurposing" application in October 2019 to be significant and in a letter dated 5 November 2019 requested Inmarsat to "maximize the available time that precedes the Long Stop Date" and to delay the sanction hearing.

21. Mr Todd QC (for Inmarsat) submitted that in view of their acceptance that the deal approved at the scheme meeting was one which an intelligent and honest shareholder, protecting his own interests, could reasonably approve, the Objectors were by their objection, evidence and appearance simply indulging in a naked attempt to extract a better deal from Bidco by utilising or weaponizing such legal arguments as they could muster to achieve their aim of an increased price over and above the one that was properly before the Court; and that that was a collateral purpose. There is force in that broad characterisation.

22. The response of Mr Chivers QC (for Oaktree) and of Mr Moore QC (for Kite Lake/Rubric) was to emphasise the detail. The Objectors had bought their shares in the market as anybody could. With the purchase (whenever made) came the inherent possibilities (i) that a scheme (which possibly undervalued the shares) might succeed; or (ii) that a scheme which offered a premium over the undisturbed share price might not be sanctioned or might fail to clear regulatory hurdles and the share price fall back; or (iii) that a material event might occur between scheme meeting and sanction hearing (such as a competing bid or a change in commercial circumstances) which put sanction in jeopardy or caused the company itself to reassess. To any of these emergent possibilities the Objectors must be free to respond. The acquisition of the shares had conferred complete equality with all other shareholders, and it was not possible fairly to distinguish shareholders who were funds or institutions from other shareholders.

23. They further submitted that in the instant case the Objectors were shareholders *exercising their rights as such*; whatever they achieved was to the benefit of all shareholders. The Objectors were not now saying that the deficiencies in disclosure were such that the result of the scheme meeting could not be accepted. They were now saying only that as a matter of discretion the court such not sanction the scheme at the sanction hearing (originally listed for 24 November 2019) but should adjourn the hearing to

enable the company (if it wanted) to convene a further meeting of shareholders. They were indeed seeking to improve the scheme: but that was a perfectly legitimate commercial objective that was consistent with an acceptance of the proposition that the scheme voted on at the meeting was one satisfied the "adequacy test". The abandonment of their opposition cannot be held against the Objectors: they should be applauded not penalised for accepting the commercial reality that what they sought (an adjournment of the sanction hearing) was no longer realistic since its inevitable consequence would be the lapse of the scheme, given Bidco's "no increase announcement". Because the opposition had been abandoned the strength of the Objectors' position had never been the subject of supportive argument, and the Court's findings, in the absence of argument on the point, cannot be held against the Objectors.

24. Having considered these respective submissions my conclusions are as follows:-

a) My discretion on costs under CPR44 is unfettered but the starting point is that I should exercise it in accordance with the guidelines that have evolved and are summarised in *Buckley* (see paragraph [11] above). As David Richards J said in Re Royal Sun Alliance at [37] "...there is much to be said for a degree of certainty in this area…".

b) The Objectors advanced grounds of opposition in correspondence: once grounds of objection had been advanced in correspondence Inmarsat was duty bound (if making its application for sanction effectively *ex parte*) to bring them to the attention of the Court and to adduce any evidence relevant to its response to the objections.

c) The Objectors are in this case not to be criticised for seeking to appear at the hearing to explain and to seek to sustain their selected grounds of objection (for the reasons given in Stronghold and Ophir). (I emphasise the words "in this case" because here three objectors instructed two Counsel to argue points that had been taken by a number of other objectors: this is not a case in which there is multiple representation to argue substantially the same points or a plethora of discrete individual points).

d) The Objectors have stood upon their rights as shareholders: they have not advanced some collateral interest.

e) It does not follow that all shareholders must be treated the same when the discretion as to costs comes to be exercised. The justice of the case may well indicate that an established investor or creditor caught up in the crossfire of a takeover or a restructuring should be treated differently as regards costs from a speculator or "opportunity investor" who deliberately chooses to put himself in the firing line by acquiring equity in an anticipated or actual bid situation or debt in a company in distress. But caution is required in drawing such distinctions because it is rare that there are "bright lines" dividing one category from another.

f) The primary consideration is not the identity of the objector but the nature and substance of the objection. Here the objections (apart from

the request to leave the sanction hearing as late as possible bearing in mind the "longstop" date) were very thin gruel. The allegation that disclosure was materially deficient came late (in October 2019). It was difficult to sustain once Inmarsat (on 19 November 2019) disclosed that it had in fact taken into account those matters that the Objectors said should be taken into account and had for commercial reasons rejected a CVR: but until that point it cannot on balance be viewed as entirely frivolous the objection based on "material change" was founded upon a froth of press speculation bolstered by inadmissible "opinion" evidence. Neither objection was advanced in support of opposition to the scheme *per se*: each was deployed as a reason for adjourning the sanction hearing.

g) The purpose of seeking to delay sanction was fairly obviously to elicit an increased offer from Bidco. That is why it was made plain that the "need" for a further scheme meeting could be avoided if Bidco would offer a CVR over and above the premium.

h) It is plain that as soon as the prospect of an enhanced offer disappeared so also did opposition to the immediate grant of sanction.

i) This is not a case in which objection with the aim of increasing Bidco's offer should rewarded by the costs of doing so being defrayed by Inmarsat. The Objectors cannot be labelled "speculators". But they were in the business of exploiting opportunities and they must bear the costs of seeking to achieve their commercial objective.

j) But on balance this is not a case in which they should pay Inmarsat's costs. On the one hand, no encouragement should be given to objections the substantial effect of which is to add significantly to scheme costs whilst contributing little to the scrutiny of what is (from the standpoint of an ordinary shareholder) a fundamentally sound scheme: adding to scheme costs in that way will only tend to depress scheme consideration. On the other hand, whilst plainly Inmarsat could not engage on an individual basis with the Objectors it could, in response to wider rumblings, have made an early market announcement conveying the information about its treatment of the Ligado contract later contained in its evidence; and that would have removed that ground for criticism and strengthened the case for an adverse costs order.

k) This is not a case in which the Objectors should pay Bidco's costs of considering their evidence or of appearing at the sanction hearing. In normal circumstances the usual undertaking to be bound by the scheme (the general role of companies such as Bidco at the sanction hearing) can be given through Counsel for the company. Bidco appeared at the sanction hearing to defend its commercial interests (as was entitled to do): but, since it did not draw to the attention of the Court any improper conduct on the part of the Objectors that had been overlooked by Inmarsat, it should bear the expense of so doing itself

25. I will make no order as to costs.

26. I do not expect attendance of legal representatives when this judgement is handed down.