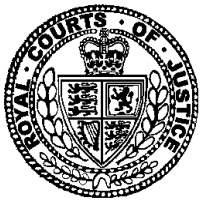

Neutral Citation Number: [2021] EWHC 3360 (Ch)

Case No: CR-2021-002285

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 09/12/2021

Before:

MR. JUSTICE MILES

- -

IN THE MATTER OF WEST AFRICAN GAS PIPELINE COMPANY LIMITED
(a company incorporated in Bermuda)

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

MR. ANDREW THORNTON QC (instructed by **Freshfields Bruckhaus Deringer LLP**) for **West African Gas Pipeline Company Limited**

MR. EDGAR YVES MONNOU (appearing in person)

MR. THOMAS SOSSA (appearing in person)

- -

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MILES:

1. This is an application by West African Gas Pipeline Company Limited (the Company) seeking permission to convene a meeting of its members for the purposes of considering and, if thought fit, approving a proposed scheme of arrangement (the Scheme) between the Company and the holders of its ordinary shares of $1 each (the Scheme Shareholders) pursuant to Part 26 of the Companies Act 2006.

2. The Company is incorporated in Bermuda and it is making a parallel application to the Supreme Court of Bermuda. It is proposed that the two schemes shall run in parallel and be inter-conditional.

3. The purpose of the Scheme is to amend a shareholders' agreement between the Company and the Scheme Shareholders. Under that agreement, certain changes to the constitutional documents of the Company require unanimity. But one of the six members of the company holding 2% of the shares is, according to the Company, unable to exercise any voting rights in relation to the Company. It follows that the Company is at present precluded from making changes to its constitutional documents. It proposes that, through the scheme mechanism, the shareholders' agreement will be amended to provide an alternative way of carrying out certain corporate acts, including making amendments to the constitutional documents, by supplementing the requirement for unanimity with an alternative provision allowing a resolution to be passed with 90% approval, provided that no shareholder votes against.

4. The background is this. The Company was incorporated in 2002. It has a single class of ordinary shares. The Company was formed to develop a natural gas pipeline running from Nigeria to Benin, Togo and Ghana. Construction of the pipeline was completed, and commercial operations commenced, in March 2011. The Company's principal operational office is in Accra, Ghana, with additional offices in Ghana, Nigeria, Togo and Benin.

5. There are six shareholders in the Company. The shareholders' agreement was originally entered into in May 2003 between the Company and its four founding shareholders. Since then, two further shareholders have become parties to the shareholders' agreement by a deed of adherence dated 11 August 2005. One of these is Société BenGaz SA, referred to in the evidence as BenGaz. It is incorporated in the Republic of Benin. It holds 2% of the Company's issued shares.

6. Mr. Germani, a director of the Company, has explained in his first witness statement that, as far as the Company is concerned, no person currently has proper authority from BenGaz to exercise its voting rights as a member of the Company, and BenGaz is unable to participate in any decision-making processes in relation to the Company. He says that has been the position since 2016. So the Company is unable to satisfy the unanimity requirements of the shareholders' agreement.

7. A number of steps have been taken in recent years to attempt to resolve the issues concerning BenGaz's voting capacity. There have been two appointments of provisional administrators under the law of Benin. Both of these have lapsed. The Company has more recently issued an application for the appointment of a further provisional administrator in the courts of Benin, but there are some doubts as to when

that ultimately will be heard and, even if a provisional administrator is appointed, appointments last only for six months, so that is unlikely to be a long-term solution.

8. Mr. Germani explains that the Company wishes to reorganise its funding structure with a view to placing it on a more sustainable footing. That may involve the shareholders converting some of their existing debt into non-voting preference shares. In order to facilitate this, it is necessary to amend the shareholders' agreement and the Company's bye-laws. But, under the existing documents, that would require a unanimous affirmative vote of all the shareholders, which the Company cannot achieve given the difficulties concerning the representation of BenGaz.

9. The proposed changes are summarised in Mr. Germani's witness statement and set out in the Scheme itself. In short, the amendments will introduce an additional procedure permitting proposed amendments to the memorandum, the bye-laws and the shareholders' agreement in the event that shareholders holding 90% of the voting rights of those present at the relevant meeting vote in favour of the proposal and no shareholder entitled to attend and vote at the meeting votes against the proposed amendment. It follows that there will be a continuing right of veto, but it will require a positive act of the relevant shareholder to exercise that veto, in contrast to the current position where unless all the shareholders affirmatively vote in favour of a relevant resolution, it will not be possible for that resolution to pass.

10. As already explained this is an application to convene a meeting. It is well-established that on applications of this kind it is emphatically not the function or role of the court to consider the merits or fairness of the scheme.

11. What the court does need to consider at this stage is, first, whether the scheme amounts to a compromise or arrangement proposed between the company and its members or any class of them within the meaning of section 895 of the Companies Act; secondly, that the proposed meeting of the members properly divides the members into appropriate classes; and, thirdly, that the notice convening the court meeting includes an appropriate explanatory statement, which must explain the effect of the compromise or arrangement, and state any material interests to the directors of the company and the effect on those interests of the compromise or arrangement insofar as it is different from the effect on the like interest of other persons.

12. The court may also at the convening stage consider whether there are any jurisdictional roadblocks which would make it impossible for the court at the sanction hearing to approve of the scheme. If it is plain and obvious at the convening stage that the scheme will never be sanctioned, the court may properly say so at the convening stage in order to avoid the waste of time and costs of continuing.

13. As regards the various requirements that I have already referred to, I am satisfied, first, that the Scheme would amount to an arrangement between the Company and the Scheme Shareholders. It involves the necessary element of give and take between the Company and the shareholders. It amends the shareholders' agreement and changes the nature of the approval required by the Company from its shareholders to undertake certain corporate acts.

14. I am also satisfied, secondly, that the explanatory statement properly complies with the requirements of the relevant practice direction and that it is appropriate for there to

be a meeting of a single class of shareholders. There is a single class of relevant shareholders and, although the Scheme is being promoted to overcome issues arising from the status of BenGaz, it impacts on the legal rights of all Scheme Shareholders in an identical fashion.

15. There may be debate at the sanction stage as to whether the meeting has fairly represented the interests of shareholders, and whether any shareholder is able to complain that the process has in some way been unfair to them. Any such issues are matters for the sanction hearing.

16. My attention was directed to the issue of the court's international jurisdiction to convene a scheme meeting and approve the Scheme under section 895(2)(b) of the Companies Act 2006 given that the Company is incorporated in Bermuda.

17. I was directed to *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), where Lawrence Collins J explained that, as a matter of jurisdiction, the English court has territorial jurisdiction to approve a scheme of arrangement in respect of an overseas company but as a matter of discretion, the court would require to be satisfied that there was a sufficient connection with England. At paragraph 29 he said:

> "The court should not, and will not, exercise its jurisdiction unless a sufficient connection with England is shown. Thus it is almost impossible to envisage circumstances in which the English court could properly exercise jurisdiction in relation to a scheme of arrangement between a foreign company and its members, which would essentially be a matter for the courts of the place of incorporation. A cross-border scheme involving the members of companies incorporated in different countries would be dealt with by separate schemes in the two countries. If it were a reconstruction or amalgamation, then the court could exercise the powers under section 427, but that section does not apply to foreign companies: section 427(6)."

18. It seems to me that in the circumstances of this case, where there is a parallel scheme being proposed to take place in the courts of Bermuda, it is well arguable that the English court could properly exercise jurisdiction in relation to a scheme of arrangement between a foreign company and its members. The reason is that the shareholders agreement is governed by English law; and under English conflict of laws, there is a reasonable doubt whether an amendment to the shareholders' agreement pursuant to a Bermudian scheme of arrangement would be enforceable under English law. In that regard, I refer to the principle known as the rule in *Antony Gibbs*, (see *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399). It seems to me that the use of parallel schemes in these circumstances arguably constitutes a case where the English court has a legitimate reason to convene and sanction a scheme parallel to one taking place in the courts of the place of incorporation.

19. It is also relevant that the two schemes are inter-conditional. Counsel for the Company explained that, through undertakings to be offered at the sanction stages, the two will be interdependent in the sense that if the Bermudian scheme does not proceed to sanction, the Company will not seek to put the English scheme into effect.

Though, as Lawrence Collins J explained, one would normally expect a scheme of arrangement of this kind to take place in the place of incorporation, for reasons already given it may be that there may well be an exception in a case of this kind where parallel schemes are proposed; still more so where they are inter-dependent and therefore may be seen as part and parcel of one another.

20. I therefore do not think that the foreign incorporation of the Company presents a roadblock.

21. I come back now to the question of the dispute as to whether there is indeed an authorised representative of BenGaz. I heard representations from Mr. Monnou, who claims to be the chairman of the board of BenGaz. He has provided some evidence before the hearing in which he explains the basis on which he contends he has been and continues to be the chairman of the board of the Company. I also heard from Mr. Sossa Adjahouto, who is a representative of one of the other shareholders of BenGaz. He supports the position of the Company and says that Mr. Monnou is not properly authorised to represent BenGaz. The Company did not object to my hearing from either of those gentlemen but made it clear that it did not accept that Mr. Monnou has a proper legal basis for representing BenGaz.

22. Mr. Monnou explained through the documents that he has provided why he claims to be the chairman and says that it is the fault of the Company itself that he has not been invited to join or vote at meetings of the Company. He explained to the Court that it was not at this stage his intention to seek to stop the process going ahead. He also made comments on the directions which were proposed by the Company.

23. At this convening stage, I am not in a position to reach any views as to the dispute about the ability of Mr. Monnou, or indeed others, to represent BenGaz. It is indeed possible that this court will not be in a position to resolve that dispute even at the sanction stage, but there may be relevant submissions nonetheless at the sanction stage about the fairness of the process given that BenGaz is not at the moment in a position to vote at all. There may also be further submissions concerning the merits of the underlying dispute about the representation of BenGaz. But all those are matters to be dealt with at the sanction hearing and should not hold up the convening of a scheme meeting.

24. In all the circumstances, I am satisfied that it is appropriate to convene the meeting sought by the Company. I have been taken through the proposed directions. They are largely standard. What is unusual in this case is the notification provisions to BenGaz. As well as serving BenGaz with the scheme documents, the Company proposes to notify a large number of other potentially interested parties, including former officers of the Company, shareholders, secured creditors, the public prosecutor and a secured creditor. I am satisfied that it is appropriate for those steps to be taken. The court is also asked to give directions as to the service of evidence. I have discussed those also with Mr. Monnou and he agrees that the proposed timetable is convenient.

25. I will make the order proposed by the Company with some minor changes.

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