[2019] IEHC 904

THE HIGH COURT
COMMERCIAL

[2019 No.253 COS]

[2019 No. 85 COM]

IN THE MATTER OF SCISYS GROUP PLC

AND IN THE MATTER OF THE COMPANIES ACT, 2014
AND IN THE MATTER OF THE IRISH TAKEOVER PANEL ACT, 1997

AND IN THE MATTER OF A PROPOSAL FOR A SCHEME OF ARRANGEMENT PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT, 2014
AND IN THE MATTER OF SECTIONS 84 TO 86 OF THE COMPANIES ACT, 2014

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 17th day of December, 2019

Introduction

1. This is my judgment on an application by SCISYS Group Plc (the "Company") for various orders in connection with the intended acquisition of the Company by the CGI Group Holdings Europe Ltd ("CGI").

2. I was due to give my judgment on the Company's application on 14th November, 2019. However, at the request of the Company and CGI, I adjourned the matter to 17th December, 2019, being a date after the general election in the United Kingdom (which was to take place, and did take place, on 12th December, 2019) which was stated to be a key event for the news programming of the media and broadcasting business of the Company in the United Kingdom. I deferred ruling on the application at that stage, as requested. Since that event has now happened, it is agreed that I can now give my judgment.

Orders sought

3. The following orders are sought by the Company on this application:

   (1) An order pursuant to s. 453 (2) of the Companies Act, 2014 (the "2014 Act") sanctioning a scheme of arrangement between the Company and its shareholders (the "Scheme"), and

   (2) An order pursuant to s. 85 (1) of the 2014 Act confirming the reduction of capital which was approved by special resolution of the members of the Company passed on 7th August, 2019 as well as various other orders under ss. 85 and 86 of the 2014 Act in connection with that capital reduction.

4. I will deal first with the Company's application to sanction the scheme. I will then deal with the capital reduction application.

Scheme of arrangement: s. 453 (2) of 2014 Act

Background and procedural issues

5. An order was made by the High Court (Haughton J.) on 8th July, 2019 admitting the Company's applications to the Commercial List, summoning a meeting of scheme shareholders (as that term is defined in the scheme) under s. 450 (3) of the 2014 Act and

giving various directions in relation to the advertising and conduct of that meeting. The court directed that the scheme shareholders meet and vote as a single class.

6. The scheme meeting took place, on foot of that order, on 7th August, 2019. The Scheme was approved by an overwhelming majority of the scheme shareholders who were present in person or by proxy and voting at the scheme meeting. 97.4% of the voting scheme shareholders voted in favour of the Scheme. Of the 151 scheme shareholders present in person or by proxy and voting, 144 shareholders voted in favour of the Scheme. Seven voted against.

7. Following the scheme meeting, an extraordinary general meeting of the Company was held. Resolutions were passed adding the entering into of schemes of arrangement as an additional object of the Company and approving the Scheme.

8. The board of the Company was recommending the Scheme for the various reasons outlined in the affidavit sworn by Mike Love on 16th August, 2019 grounding the Company's application for court sanction in respect of the scheme.

9. By an originating notice of motion dated 20th August, 2019, the Company applied for orders fixing the date of the hearing of the application to sanction the Scheme (and for the associated capital reduction orders) and for directions in relation to that hearing.

10. On 27th August, 2019, being satisfied that the directions contained in the order of 8th July, 2019 had been complied with, I fixed Wednesday, 30th October, 2019 as the date for the hearing of the application to sanction the Scheme (and for the associated capital reduction orders). I directed that the hearing date be advertised in a number of Irish, UK and international publications and in Iris Oifigiúil by 10th September, 2019. I also gave directions in the event that any interested person wished to appear at the hearing. Notice of any intention to do so had to be provided by a specified date in advance of the hearing.

11. The reason why the hearing was fixed for a date over two months from the date the proceedings were entered in the Commercial List was because the Scheme was subject to certain regulatory and anti-trust/competition conditions, some of which remained outstanding as of 27th August, 2019. However, it was expected that those conditions would be satisfied, and the required clearances obtained, by the end of 2019.

12. Prior to 30th October, 2019, being the date fixed for the sanction hearing, I was informed that, while the outstanding clearances had been obtained, certain further steps for the proposed delisting of the Company's ordinary shares from the AIM and Euronext Growth platforms had not yet been effected. It was agreed, however, that the application could proceed on 30th October, 2019, but that no order would be made that day and that the application would be further adjourned to enable the outstanding steps to be completed thereafter.

13. No person had given notice of his or her intention to appear at the hearing and no person appeared. As the proceedings are "*takeover proceedings*" under O.75 r.18 RSC, they

were served on the Director of the Irish Takeover Panel (the "Panel"). The Director was served with the papers in advance of the hearing on 30th October, 2019 and was informed of the Company's intentions as regards the adjournment of the application. The Company has kept the Panel informed of the ongoing developments in relation to the application.

14. At the hearing on 30th October, 2019, I was satisfied that the directions made on 27th August, 2019 in relation to the advertising of the sanction hearing had been complied with. Evidence to that effect was provided in an affidavit sworn by David Ormsby (a solicitor in Mason Hayes & Curran, the Company's solicitors) on 29th October, 2019.

15. Counsel for the Company took me through the papers to demonstrate compliance with the statutory and other requirements for the sanctioning of a scheme of arrangement under Part 9, Chapter 1 of the 2014 Act. I was also provided with very helpful written submissions in support of the Company's application. As requested by the Company, I agreed to defer ruling on the application until 14th November, 2019 and further deferred my ruling to today's date for the reasons explained earlier in this judgment.

16. Prior to delivering my ruling on the Company's application on 17th December, 2019, I was furnished with an affidavit sworn by Mr. Ormsby on 16th December, 2019 which evidenced the provision of the papers in respect of the Company's application and the various supporting documents to the Director of the Panel. That affidavit also demonstrated that the Panel was kept informed of developments in the case. The Director of the Panel confirmed receipt of the papers and of the update provided.

The statutory requirements

17. The statutory requirements which must be satisfied before a scheme of arrangement becomes binding on the members of the company concerned (or on its creditors, as the case may be) are set out in s. 453 of the 2014 Act. In summary, s. 453 (1) provides that the scheme will be binding on the members of the company concerned if certain conditions are satisfied. Those conditions are set out in s. 453 (2). They may be summarised as follows:

    (1) There must be a "*special majority*" of those voting at the scheme meeting voting in favour of a resolution agreeing to the particular scheme. A "*special majority*" is a majority in number representing at least three fourths in value of the members.

    (2) Notice of the passing of the resolution at the scheme meeting and that an application will be made to the court in relation to the scheme must be advertised in at least two daily newspapers where the registered office or principal place of business of the company is situated.

    (3) The scheme must be sanctioned by the court.

The test

18. The test which is applied by the Irish courts in considering whether to sanction a scheme of arrangement is well established. It was recently discussed by me in a judgment delivered on 26th November, 2019 in *In Re. UBS EFTs Public Limited Company and UBS (IRL) ETF Public Limited Company* [2019] IEHC 860 ("*UBS*"). The classic statement of the test is to be found in the judgment of Kelly J. in In Re *Colonia Insurance (Ireland) Ltd* [2005] 1 IR 498 ("*Colonia*") (which concerned a scheme of arrangement in relation to a solvent insurance company). The test has since been applied to takeover or acquisition schemes (such as *in In Re Depfa Bank Plc* [2007] IEHC 463 ("*Depfa*")) and, recently, in the case of a scheme of arrangement concerning an insolvent company (*In Re Ballantyne Re Plc* [2019] IEHC 407 ("*Ballantyne*")). I am satisfied that it is the appropriate test to be applied on this application.

19. In summary, the test requires the court to be satisfied of the following five matters, namely, that:

    (1) Sufficient steps have been taken to identify and notify all interested parties,

    (2) The statutory requirements and all directions of the court have been complied with,

    (3) The class of members or creditors, as the case may be, has been properly constituted,

    (4) There is no improper coercion of any of the members (or creditors, as the case may be), concerned; and

    (5) The scheme is such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her interest, might reasonably approve of it.

    I would add that a court will not sanction a scheme of arrangement which is *ultra vires* the company concerned. That is not an issue in the present case.

20. In my view, the evidence before the court is such that the court can be satisfied of those five matters and I am so satisfied. I briefly explain below my reasons.

21. As regards (1), the scheme meeting was advertised as directed by the order of Haughton J. made on 8th July, 2019 in the required publications and on the Company's website. The scheme circular and the relevant proxy forms were posted to the scheme shareholders. As is usual in such schemes, there was a direction given by Haughton J. on 8th July, 2019 excusing the Company from posting the scheme circular to any scheme shareholders in restricted jurisdictions (one such shareholder was in India and three were in Australia, both restricted jurisdictions for present purposes). I am quite satisfied on the evidence that sufficient steps have been taken to identify and notify all interested parties of the Scheme and of the sanction hearing.

22. As regards (2), a scheme meeting was advertised in accordance with the directions given on 8th July, 2019. Notice of the passing of the resolution at the scheme meeting on 7th

August, 2019 and of the date of the sanction hearing was given in accordance with the directions made on 27th August, 2019 and in accordance with s. 453 (2) of the 2014 Act.

23. As regards (3), as noted earlier, in his order of 8th July, 2019, Haughton J. summoned the meeting of shareholders as a single class. The reasons for this were fully set out in the affidavit sworn on behalf of the Company by Ms. Natasha Laird on 3rd July, 2019, which was before Haughton J., when he made his order. The possibility of different classes of members arising was addressed in that affidavit and was considered by Haughton J. and ruled out at that stage. Haughton J. considered that a single class of members was appropriate, albeit that he did so on an ex *parte basis.* In circumstances where no person has appeared to contest or dispute the appropriateness of a single class of members meeting to approve the scheme, I am of the view that the court should be slow to reach a different view to that reached at the *ex parte* stage by Haughton J. I refer in this context to, and adopt, the decision of the Court of Appeal of England and Wales in *In Re Hawk Insurance Co. Ltd*. [2001] 2 BCLC 480 and, in particular, the observations of Chadwick L.J. at paras. 20-21, p. 513.

24. As I indicated in my judgment in *UBS* (at para. 23 and subsequent paragraphs), the test in this jurisdiction for the determination as to what constitutes a proper class of members or creditors, as the case may be, for the purposes of a scheme of arrangement is that referred to in the judgment of Laffoy J. in the High Court in *In Re. Millstream Recycling Ltd* [2009] IEHC 571. Laffoy J. in turn approved the test outlined by Bowen L.J. in the Court of Appeal of England and Wales in *Sovereign Life Assurance Co. v. Dodd* [1892] 2 QB 573. A class, properly so called, consists of: "*those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest"* (per Bowen L.J. at p. 583).

25. I am satisfied, on the basis of the evidence contained in the affidavits sworn by Mr. Love and by Ms. Laird, that a single class of members was appropriate. I agree with the submission advanced by counsel on behalf of the Company that the fact that the directors had given an irrevocable undertaking to vote in favour of the Scheme did not require them to be constituted and treated as a different and separate class from the other scheme shareholders. I note and agree with what Kelly J. stated on that point in *Depfa* (at pp. 4 to 5 of his judgment). In my view, therefore, the third requirement which the court must be satisfied (as set out by Kelly J. in *Colonia*) has been satisfied in the present case.

26. As regards (4), the court must, of course, be satisfied that there has been no coercion of the shareholders in respect of the scheme. As I pointed out previously in *Ballantyne* and *UBS*, every scheme, in a sense, involves an element of coercion. However, I believe that this criterion is directed to improper coercion or pressure. No question of such coercion has been alleged or appears to me to arise on the facts of this case. This requirement has, therefore, also been satisfied.

27. As regards (5), the court must be satisfied that the Scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her own interest,

might reasonably approve of it. I have no doubt on the evidence that this requirement is satisfied.

28. In considering this requirement, one starts with the fact that the Scheme has been overwhelmingly supported by the scheme shareholders. 97.4% of the scheme shareholders voting in person or by proxy and 144 out of 151 of such shareholders supported the Scheme at the scheme meeting on 7th August, 2019.

29. I agree, of course, with what Kelly J. stated in *Colonia* and again in *Depfa* that the court is not a rubber stamp but also that it will be slow to differ from experienced persons who are familiar with the subject matter of the scheme. In my judgment in *Ballantyne*, I referred to and considered many of the relevant cases on this question (see paras. 55 – 86 of the judgment in *Ballantyne*). It is unnecessary to repeat that discussion here. On the basis that the authorities referred to and the principles derived from those authorities (as discussed in *Ballantyne*), I am quite satisfied that this fifth requirement is met on the facts of this application. I am also satisfied that the Scheme is fair, reasonable and equitable for all of the reasons set out in the Mr. Love's affidavit.

30. Accordingly, I will make an order pursuant to s. 453 (2) of the 2014 Act sanctioning the scheme of arrangement between the Company and its shareholders (a copy of which is set out at Appendix 1 to the originating notice of motion dated 20th August, 2019).

The capital reduction application
Background

31. The Scheme also comprises a reduction of the issued capital of the Company in that certain shares will be cancelled and extinguished without reducing the authorised share capital of the Company. This was given effect to by means of a resolution passed at the extraordinary general meeting. There is nothing in the constitution of the Company to limit or restrict the power to reduce its capital contained in s.84 of the 2014 Act.

32. Contingently upon the reduction of capital taking effect, the issued share capital of the Company will be increased to its former amount by the allotment of new shares equal to the number of cancelled shares, with such new shares having the same rights as the cancelled shares. The reserve arising in the books of account of the Company as a result of the reduction of capital by the cancellation of the shares under the Scheme will be capitalised and applied in paying up in full at par the new shares which will be allotted and issued credited as fully paid to CGI. Resolutions to give effect to this were passed at the extraordinary general meeting. The proposed reduction of the Company's capital does not impact on the position of creditors in any respect and is momentary. Evidence to this effect (which I accept) is contained in Mr. Love's affidavit.

33. It is quite common in a scheme of arrangement, such as that at issue in this application, for the confirmation of the court to be sought under s.85 of the 2014 Act in respect of a reduction of share capital.

The test

34. The principles to be applied by a court in exercising its discretion as to whether or not to confirm a resolution reducing the share capital of a company under s.85 of the 2014 Act were very helpfully set out and summarised by the High Court (Barrett J.) in *In Re Permanent TSB Group Holdings plc*. [2015] IEHC 500. At para. 42 of his judgment in that case, Barrett J. set out six factors of which the court must be satisfied before it should confirm a proposed capital reduction. They are as follows:

> *"(1) In a case to which the Act of 1963 applies, the company is authorised by its articles of association to reduce its capital;*
>
> *(2) the company duly resolved by special resolution to reduce its share capital;*
>
> *(3) the reduction proposals were properly explained to the shareholders so that they could exercise an informed judgment;*
>
> *(4) the reduction of share capital is for a discernible purpose;*
>
> *(5) all shareholders are treated equitably; and*
>
> *(6) the creditors of the company are safeguarded."*

35. I am satisfied that these are the principles which I must apply in deciding whether or not to confirm the proposed capital reduction in the present case. I will deal briefly with each of the requirements in turn.

36. As regards (1), the Companies Act, 1963 does not apply in the present case. The 2014 Act applies. Under s.84 of the 2014 Act, a company may reduce its capital except to the extent that its constitution otherwise provides. I am satisfied on the evidence that there is nothing in the constitution of the Company which removes or limits the entitlement of the Company to reduce its capital under s.84 of the 2014 Act.

37. As regards (2), the Company did resolve by special resolution to reduce its share capital by resolution passed at the extraordinary general meeting.

38. As regards (3), I am satisfied that the scheme circular did fully set out and explain the Scheme in full, including the relevant share cancellation resolution proposed at the meeting.

39. As regards (4), the reduction of share capital is for a discernible purpose, being the implementation of the acquisition of the Company by CGI through the Scheme.

40. As regards (5), all of the scheme shareholders have been treated equally and equitably. Each shareholder will receive the same consideration per share under the Scheme.

41. Finally, as regards (6), I am satisfied on the evidence that there will be no impact on the creditors of the Company.

42. Each of the requirements summarised by Barrett J. in *Permanent TSB* is satisfied in the present case.

43. Section 85(2) of the 2014 Act requires that a company which proposes to apply to the court for an order confirming a resolution reducing its capital must cause notice of the passing of the resolution to be advertised and to be notified to creditors of the company. I am satisfied on the evidence that those requirements were duly complied with by the Company.

44. As I have explained earlier, the reduction of share capital in respect of which confirmation is sought on this application is momentary. As was explained by Mr. Love (at para. 53 of his affidavit), contingently upon the share cancellation resolution taking effect, the issued capital will be brought back to its former amount by the issue of an equivalent number of new shares from the reserve arising on the cancellation. It is clear on the evidence that the capital reduction is one which does not in any way impact on the affairs of the Company's creditors as the Company will be immediately recapitalised following the cancellation. The capital reduction is part and parcel of the scheme. For all of these reasons, I am entirely satisfied that I should exercise my discretion to confirm the share cancellation resolution and the consequent reduction in the capital of the Company.

45. As the proposed reduction does not involve either a diminution of liability in respect of unpaid company capital or the payment to any shareholder of any paid-up company capital, for the purposes of s.85(4) of the 2014 Act, and as the reduction of capital is a momentary state of affairs and there is no impact on the position of the creditors of the Company, I am satisfied that there is no requirement for the court to settle a list of creditors under s.85(4) of the 2014 Act.

Conclusions

46. In conclusion, for all of the reasons set out in this judgment, I will (a) sanction the scheme of arrangement between the Company and the scheme shareholders pursuant to s.453(2) of the 2014 Act, having found that the applicable test has been satisfied and that the scheme is fair and equitable, (b) confirm the proposed reduction of the issued share capital of the Company pursuant to the share cancellation resolution passed at the extraordinary general meeting of the Company, (c) order that the provisions of s.85(4) of the 2014 Act shall not apply, (d) make the further orders set out in the draft order provided by the Company. I will give liberty to apply.