No. CR-2019-001989

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
COMPANIES COURT

[2019] EWHC 1030 (Ch)

Rolls Building
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Monday 1st April 2019

Before:

THE HONOURABLE MR. JUSTICE MARCUS SMITH

IN THE MATTER OF:
INTEROUTE NETWORKS LTD & OTHERS

AND IN THE MATTER OF:
THE COMPANIES (CROSS-BORDER MERGERS) REGULATIONS 2007

Mr Stephen Horan (instructed by Bird & Bird LLP) appeared on behalf of the Applicants.

J U D G M E N T

MR JUSTICE MARCUS SMITH:

1 This is a hearing of two applications for the sanction, under Regulation 16 of the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (the "Regulations"), of two linked cross-border mergers of companies. The mergers involve 13 companies, all within a single group, the Interoute group of companies. Each merger is a merger by absorption under Regulation 2(2) of the Regulations.

2 The first merger involves eight companies, six of which are English, one Scottish and one Dutch. There is one surviving transferee, MDNX Group Holding Ltd ("MDNX"), which is an English company. All of the transferor companies are wholly owned subsidiaries of MDNX. I shall refer to this merger as "Merger 1".

3 Merger 1 was before Rose J on 6 December 2018. At this hearing, she declined to sanction Merger 1 on the grounds of a serious technical defect, which I will address in a moment.

4 Immediately after Merger 1 completes, it is intended that the second merger of six companies will complete. I shall refer to this merger as "Merger 2". MDNX, the transferee under Merger 1, is involved as transferor under Merger 2. MDNX will merge into its direct sister subsidiary, Interoute Networks Ltd ("Interoute Networks"). Interoute Networks is also an English company and is the transferee and sole surviving entity under Merger 2. There are four other transferor companies involved in Merger 2: three are English and one is Dutch. They are all direct sister subsidiaries of Interoute Networks.

5 All of the merged companies have the same common parent, Interoute Communications Ltd. Each of the mergers involves one Dutch company, in order to establish the cross-border status for the merger.

6 The draft terms of each merger can be found in a single document, which I have been shown. The reason two mergers are being contemplated, rather than a single merger, is that if there was a single cross-border merger, the Dutch regulations would otherwise require an expensive and time-consuming audited report because the Merger 1 companies are not direct sister companies of Interoute Networks, even though they are wholly owned within the same group.

7 Under each merger, all of the assets and liabilities of each transferred company will be transferred to the transferee MDNX or Interoute Networks, as the case may be. Each of the transferor companies would be dissolved without going into liquidation as required under Regulation 2(2)(e) of the Regulations. The purpose of the two mergers is to reduce the number of subsidiaries within the group in an economical and efficient manner.

8 I make one point on the relationship between the two mergers. At the moment, they are scheduled to take place on 22 April 2019. Given that it is necessary for Merger 1 to take place before Merger 2, it is important that on that date we have a staged process, with the timing of each merger set out. Counsel will include that in the draft order that I have before me.

9 One issue which is peculiar to this matter is the question of the withdrawal from the European Union of the United Kingdom. As of today's date, there is no certainty as to what will occur in the future. But it is at least possible that even if an order is made under the Regulations by me today pursuant to Regulation 16, the consequences of the merger – which are set out in Regulation 17 – will have effect not less than 21 days after the date on which the order is made. For these mergers, the effective date will therefore be 22 April 2019.

10 We do not know what the position will be if the United Kingdom were to leave the European Union before that date, as is theoretically possible: as at the date of this ruling, it is possible that the United Kingdom will exit the European Union on 12 April 2019. It seems to me that, whilst I undoubtedly have jurisdiction as of today to make an order under the Regulations, there is inevitably some degree of uncertainty as to whether that ruling will be effective across the European Union in the future after 12 April 2019, the present date for the withdrawal of the United Kingdom. In particular, I must consider the position in the Netherlands where, as I have identified, two of the companies being merged exist.

11 This question should not, in my judgment, preclude the making of an order today in relation to Mergers 1 and 2. But it does seem to me that any order that I make must take into account the potential for a legally disruptive event (viz, the exit of the United Kingdom from the European Union on terms making no provision for this eventuality) between the making of the order (1 April 2019) and the time the order would, in the ordinary course, come into effect (22 April 2019). In short, my order needs to bear in mind that it may not be effective after 12 April 2019, in particular in the Netherlands.

12 Accordingly, <u>if</u> there is an issue regarding the enforceability of the Regulations as at 22 April 2019 or an issue regarding their recognition across the European Union – and although I say the European Union, these mergers turn principally on the approach in the Netherlands – then there is a liberty in the Applicants to restore this matter before me, so that the implications of any potentially legally disruptive event can be taken into account. I very much hope that such a step not be necessary, but it seems to me important to provide, in the order, a mechanism just in case it is.

13 The original rules regarding cross-border mergers – Directive 2005/56/CE dated 26 October 2005 of the cross-border mergers of limited liability companies (the "2005 Directive") – were consolidated and codified in June 2017 into Directive 2017/1132 (the "2017 Directive"). However, the Regulations still refer to the 2005 Directive and I shall, where appropriate, refer to both Directive provisions which underlie the Regulations.

14 There are two key stages to a cross-merger merger. First, the hearing for a pre-merger certificate and, secondly, the sanction of the merger by a competent authority as required by Article 128 of the 2017 Directive (Article 11 of the 2005 Directive).

15 In this case, as I indicated earlier, there was an issue regarding the pre-merger certificates which came before Rose J in December last year. In a judgment with a neutral citation [2018] EWHC 3396 (Ch), Rose J considered the question of an erroneous order of certification at the pre-merger stage where, in that case, the problem was that the notice published by the registrar in the Gazette, as required by Regulation 12, did not include the particulars of date, time and place for a meeting summoned under Regulation 11. Rose J found that the orders of ICC Judge Barnett certifying that the pre-

merger acts and formalities had been concluded was conclusive and that she would not go behind this certification. To be clear, that is the approach that I am following as regards the English companies in Merger 1 and Merger 2.

16 However, Rose J found that the same could not be said of the certification by the Court of Session in relation to the Scottish company that was part of Merger 1. Accordingly, it was necessary for the Applicants in this case to re-visit the certification certificate in front of the Court of Session for the Scottish company involved in the mergers. As a result of that, new Part 8 claim forms were issued on 8 March 2019 in respect of each of the mergers. So that, in addition to the "Brexit issue" that I have already dealt with, is a minor hiccup, but one that has been cured in the context of these applications.

17 The jurisdiction to approve or sanction a merger itself has two stages. The first is whether the formal requirements under Regulation 16(1) have been met. There are six requirements that need to be satisfied before I have jurisdiction to make the order that is sought. I consider them in turn.

(1) *Regulation 16(1)(a): the transferee must be a UK company.* I am satisfied that that is the case as regards both MDNX and Interoute Networks.

(2) *Regulation 16(1)(b): an order has been made under Regulation 6 for each UK merging company.* I have mentioned the pre-merger certificates in this case and I am satisfied that those pre-merger certificates are compliant including, to be clear, the pre-merger certificate regarding the Scottish company under Merger 1.

(3) *Regulation 16(1)(c): a pre-merger certificate from a competent authority which has been issued for each EEA company.* I have seen the pre-merger certificates for the Dutch companies in question and, again, I am satisfied that this requirement has been met in this case by the certification by the notary in Holland.

(4) *Regulation 16(1)(d): the application must be made within six months of the pre-merger certificates.* This application is within time.

(5) *Regulation 16(1)(e): the draft terms of the merger approved by each pre-merger certificate are the same.* Again, I am satisfied that this particular requirement has been met.

(6) *Regulation 16(1)(f): where appropriate, arrangements for employee participation in the transferee companies have been terminated in accordance with Part 4 of the Regulations.* The applicability in this case is determined by the terms of Regulation 22. None of the criteria specified Regulation 22 are met, and therefore Part 4 does not apply.

18 I therefore find that the formal requirements for approving the applications and for sanctioning the mergers have been met.

19 There remains the question whether there is a discretion in the courts regarding the approval of the merger. Here there is a range of judicial opinion. On one end of the scale is the test posited by Sales J in *Diamond Resorts (Europe) Ltd* [2012] EWHC 3576

(Ch), where Sales J held that it was for the court to "… examine the proposed merger with a view to being satisfied that it is does not adversely affect any stakeholder in any of the merging companies (whether shareholder, employee or creditor) in any material way, and, further, that there is no other good reason why approval of the proposed merger should be refused."

20 That is a test which aligns with the sort of consideration given to schemes of arrangement. There is a body of case law which suggests that the existence of discretion is perhaps not consistent with the approach that ought to be taken with regard to a Regulations that are implementing the 2005 and 2017 Directives. This is not a matter I find that I should determine today. Courts generally apply the *Diamond Resorts* test with a view to avoiding controversies and they do so because most of the mergers that come before this court will satisfy the more stringent *Diamond Resorts* test as well as, of course, the lower tests that have been propounded in other cases.

21 I propose to apply the *Diamond Resorts* test. Applying that test, it seems to me that in the case of the two mergers here the potential for objection to the mergers is very difficult to see. These are essentially intra-group mergers intended to render more efficient the corporate structure of the group. I can see absolutely no prejudice to anyone in the mergers going ahead. Accordingly, I find that the *Diamond Resorts* test, if that is the test, has been satisfied in this case.

22 Finally, I should note that the transferor companies (MDNX Holdings and Interoute Communications Ltd) have waived their right to be issued shares in the respective transferees as consideration for the transfer of the assets and liabilities of those companies. That is not a matter that is dealt with explicitly in the Regulations, but there is authority which holds that there is a power to waive: *Re Olympus UK Ltd* [2014] BCLC 402.

23 Accordingly, it seems to me that I should sanction the two mergers and I will make an order to that effect incorporating the suggestions that I have made during the course of this hearing.

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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This transcript has been approved by the Judge