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Case No: CR-2019-000104

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

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

Date: 26 March 2019

Before:

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF STERIS PLC
AND
IN THE MATTER OF THE COMPANIES ACT 2006

Andrew Thornton (instructed by **Jones Day**) for the **Company**

Hearing date: 25 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is an application for the sanction of a scheme of arrangement ("the Scheme") pursuant to Part 26 of the Companies Act 2006 ("the Act") and confirmation of an associated reduction of capital in relation to STERIS plc ("the Company").

The Company

2. The Company is a parent company of a group of companies whose business is the provision of healthcare products and services. It operates in the United Kingdom and Ireland, Europe and the Middle East, the Americas and Asia and Africa.

3. The Company has two classes of share in issue, Ordinary Shares of £0.10 each and redeemable Preference Shares of £0.10 each. There are about 84.75 million Ordinary Shares in issue with a nominal value of about £8.475 million. They are listed on the New York Stock Exchange ("NYSE") and a significant proportion are held through Depository Trust Company ("DTC"). In common with other English companies listed on the NYSE, for the purposes of the Act, the "member" whose name appears on the register in respect of the shares held through DTC is Cede & Co ("Cede"), which is the nominee of DTC.

4. The Preference Shares were issued to one of the Company's service providers by way of a private placement on 2 November 2015 in satisfaction of a debt owed to it. There are 100,000 Preference Shares in issue with a nominal value of £10,000. The Preference Shares carry a fixed cumulative preferential dividend of 5% but have no right to attend, speak or vote at general meetings. They are therefore not equity share capital of the Company as defined by section 548 of the Act. Under the Company's articles, the Preference Shares are currently redeemable on or after the 8th anniversary of their issue.

The Scheme

5. The purpose of the Scheme is to redomicile the parent company of the group from the United Kingdom to the Republic of Ireland by inserting a new company incorporated in the Republic of Ireland (also named "STERIS plc" but which I shall refer to as "STERIS Ireland"), as the holding company for the Company. This is to ensure that the group's financial position and its ability to continue conducting its business is not adversely affected by the decision of the United Kingdom to leave the European Union ("Brexit"). In particular, according to the explanatory statement, this change of domicile is intended to mitigate the uncertainty and risks of the parent company of the group being "domiciled in the unknown economic and regulatory environment that could prevail in the United Kingdom following Brexit"; and is to ensure that the group can preserve more than US$50 million in future financial benefits in the United States that are supported by tax treaties between the US and the EU, which would be at risk if the parent company of the group remained domiciled in the UK after Brexit and no equivalent tax treaties were concluded between the UK and the US.

6. The scheme is a "cancellation" scheme of arrangement which applies only to the Ordinary Shares of the Company (the "Scheme Shares"). Under the Scheme, the Scheme Shares will be cancelled and the reserve arising on the cancellation will be applied in paying up in full new Ordinary Shares having the same aggregate nominal value as the Scheme Shares cancelled. The new Ordinary Shares will be allotted and

issued to STERIS Ireland, in consideration for which it will issue one new STERIS Ireland Share to the Scheme Shareholders for each Scheme Share held by them. In the usual way, STERIS Ireland will become bound by the Scheme through the provision of an undertaking to the Court.

7. As the entire reserve arising on the reduction of capital involved in the Scheme will be applied in paying up new shares of an identical aggregate nominal amount, there will be no permanent reduction in the Company's share capital. Accordingly, the interests of the Company's creditors will not be prejudiced by the proposed Scheme (or the reduction of capital it entails). There will, however, be a very short period of time during which the nominal value of the Company's allotted share capital will be below the authorized minimum. That is permissible in the case of a reduction forming part of a cancellation scheme such as this: see e.g. MB Group plc [1989] BCLC 672.

8. In the explanatory statement sent to shareholders, the Company stated that the last day for trading in Scheme Shares on the NYSE was expected to be this Wednesday, 27 March 2019. The intention is that the record time for the purposes of the reduction of capital and fixing the entitlement of Scheme Shareholders to the issue of new shares in STERIS Ireland (the "Reduction Record Time") will be 23.59 hours GMT on that day (i.e. after the close of the NYSE). The Scheme will then be made effective in the UK this Thursday, 28 March 2019, following which the STERIS Ireland shares will be listed on the NYSE under the same "STE" code as the Company's shares, so that the transition from the Company to STERIS Ireland will, for all trading purposes, be seamless.

9. The Scheme does not apply to the Preference Shares, but the Company intends to redeem them shortly after the Scheme takes effect. That will require an amendment to the Company's articles to permit such redemption prior to the 8th anniversary of issue.

10. The cessation of trading on NYSE, the Scheme and reduction of capital being made effective, the re-registration of the Company and the redemption of the Preference Shares will require careful choreography as follows:

    i) trading will cease in the Scheme Shares on the NYSE and the Reduction Record Time will pass, fixing the identity of the Scheme Shareholders;

    ii) the Scheme and reduction of capital will take effect upon delivery of the Court Order and statement of capital to the Registrar of Companies (see sections 649(3)(a)(i) and 899(4) of the Act);

    iii) the Court Order will also authorise the re-registration of the Company as a private limited company (see section 651(1) of the Act);

    iv) following re-registration, the Court's Order sanctioning the Scheme and confirming the reduction of capital will be registered by the Registrar of Companies (see section 650(2)(b) of the Act); and

    v) the Company will then pass the necessary resolutions to amend its articles to permit redemption of the Preference Shares, and will redeem them.

11. In addition to the Scheme, the Company maintains a long-term incentive plan. By arrangements outside the Scheme, the existing rights to Ordinary Shares in the Company will be exchanged for the same rights in respect of shares in STERIS Ireland.

The law

12. The function of the Court at the sanction hearing of a scheme of arrangement under Part 26 of the Act is well-known. It is set out in a frequently cited passage from *Buckley on the Companies Act*, and was summarised by Morgan J in Re TDG plc [2009] 1 BCLC 445 at [29] as follows:

    i) the Court must be satisfied that the provisions of the statute have been complied with;

    ii) the Court must be satisfied that the class of shareholders, the subject of the court meeting, was fairly represented by those who attended the meeting, and that the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent;

    iii) the Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme; and

    iv) there must be no "blot" (i.e. defect) on the scheme.

13. In relation to the reduction of capital, sections 645 to 649 (inclusive) of the Act confer upon the Court the jurisdiction to confirm a reduction of share capital. The authorities such as Re Jupiter House [1985] 1 WLR 975 and Re Ratners Group plc (1988) 4 BCC 293 demonstrate that provided that proper provision has been made for creditors' claims, the Court will generally confirm a reduction of capital which has been resolved upon for a discernible purpose by the members of a company.

The Court and Company meetings

14. By order of Deputy Insolvency and Companies Court Judge Barnett dated 25 January 2019, the Company was given permission to convene a single meeting of the holders of the Scheme Shares. Since all the Scheme Shareholders are being offered the same deal under the terms of the Scheme, namely an exchange of their Scheme Shares for an equivalent number of shares in STERIS Ireland, it was entirely appropriate to call a single meeting of the class of Scheme Shareholders.

15. At the Court meeting, which took place on 28 February 2019, 87 of the 90 Scheme Shareholders who participated voted in favour of the Scheme, holding 74,017,171 Scheme Shares. Three Scheme Shareholders voted against the Scheme holding 379,594 Scheme Shares. The majorities in favour were therefore 96 per cent in number representing 99.5 per cent in value.

16. Similar majorities in favour of the special resolution to approve the reduction of capital of the Company were obtained at a general meeting of the Company held shortly after the Court meeting.

17. In order to enable Cede to know how to cast the votes attached to the Scheme Shares it held in the Company, the Company fixed a record date for voting purposes for the beneficial owners of its shares holding through DTC of 25 January 2019. This was almost a month before the record date for voting purposes for the registered holders of Scheme Shares, which was on 26 February 2019. During the period 25 January to 26 February 2019, Cede's registered shareholding decreased by 3,594 shares (from 84,534,187 to 84,530,930). Cede received instructions to vote (and did vote) 74,398,602 Scheme Shares at the Court Meeting.

18. It is not possible to determine whether the 3,594 shares disposed of by Cede in the period between the two voting record dates were in fact voted and, if so, how. In particular, it is not possible to ascertain whether such shares might effectively have been voted twice – once because they were the subject of a voting instruction given to Cede by their beneficial owners, and then a second time because they were then sold and transferred and voted directly by the new registered owners. That is a risk inherent in such a long time period between the two voting record dates, but on the facts of this case, given that Cede voted far less than the total number of shares registered in its name, and there was only a small number of shares that might conceivably have been affected in this way, I can safely conclude that the effect on the majorities obtained of any such double voting would in any event have been immaterial.

19. Accordingly, I find that the Scheme was approved overwhelmingly by Scheme Shareholders on a representative turnout of members.

20. I therefore turn to consider the requirements for sanction summarised above.

The statutory requirements

21. The Scheme clearly falls within Part 26 of the Act: it is an arrangement between the Company and its class of members holding Ordinary Shares under which the Company will cancel their shares, in return for which they will receive new shares in STERIS Ireland.

22. There is, however, an issue as to whether the Scheme falls foul of the prohibition on certain types of reductions of capital in section 641(2A) of the Act.

23. Sections 641(2A) – (2C) CA 2006 provide,

> "641(2A) A company may not reduce its share capital under subsection (1)(a) or (b) as part of a scheme by virtue of which a person, or a person together with its associates, is to acquire all the shares in the company or (where there is more than one class of shares in a company) all the shares of one or more classes, in each case other than shares that are already held by that person or its associates.
>
> (2B) Subsection (2A) does not apply to a scheme under which -
>
> (a) the company is to have a new parent undertaking,

> (b) all or substantially all of the members of the company become members of the parent undertaking, and
>
> (c) the members of the company are to hold proportions of the equity share capital of the parent undertaking in the same or substantially the same proportions as they hold the equity share capital of the company.
>
> (2C) In this section -
>
> "associate" has the meaning given by section 988 (meaning of "associate"), reading references in that section to an offeror as references to the person acquiring the shares in the company;
>
> "scheme" means a compromise or arrangement sanctioned by the court under Part 26 (arrangements and reconstructions)."

24. The background to the introduction of these provisions was explained in paragraph 7 of the Explanatory Memorandum (the "BIS memorandum") prepared by the Department for Business, Innovation & Skills in connection with The Companies Act 2006 (Amendment of Part 17) Regulations (SI 2015 No. 472) in the following terms,

> "7.1 Takeovers and mergers are given effect either by a contractual offer to the target company's shareholders to purchase their shares, or by means of a scheme of arrangement, a long-established court sanctioned process for making changes to a company's share or debt structures.
>
> 7.2. In the context of takeovers, there are two main types of schemes of arrangement: a 'transfer' scheme sees the transfer of shares in the target company to new owners; a 'cancellation' scheme sees a reduction of the target company's share capital (as governed by Part 17 of the Companies Act 2006) and the issue of new shares to the new owners. Stamp taxes on shares are charged on the transfer of shares but not on the issue of new ones. So implementation of a 'transfer' scheme requires payment of tax (at 0.5% of the consideration paid for the shares) but no such liability flows from implementation of a 'cancellation' scheme.
>
> 7.3 Takeovers of UK public companies are increasingly being carried out via 'cancellation' schemes of arrangement, thus not incurring the stamp taxes on shares liability. The Government believes that all takeovers should be treated equally in tax terms, and is therefore taking action to close what is effectively a tax loophole. This is being achieved through a targeted amendment to section 641 of the Companies Act 2006 that will prevent a company from reducing their share capital alongside a 'cancellation' scheme of arrangement to facilitate its takeover. It will still be possible to effect a takeover by means of a 'transfer' scheme of arrangement.

> 7.4 The Government recognises that there are other situations where a scheme of arrangement and/or a reduction of capital may be appropriate such as intra-group restructuring, de-mergers, rescheduling debt or returns of capital. This instrument therefore includes a specific exemption for circumstances where the acquisition amounts to a restructuring that inserts a new holding company into the group structure, where shareholders of the new holding company have not changed substantially from the shareholders of the company undertaking the scheme of arrangement."

25. There is a potential disconnect between (i) the language of sub-section 641(2A) which includes in the prohibition a scheme for the acquisition of all of a class of shares of a company, and (ii) sub-section 641(2B)(b) which, by way of disapplication of the prohibition, simply refers to a scheme under which "all or substantially all of the members of the company become members of the parent undertaking". Read literally, that might prohibit some cancellation schemes involving more than one class of shares. However, it is clear from the inclusion of the words "substantially all", and the explanation in paragraph 7.4 of the BIS memorandum, that Parliament intended that a cancellation scheme could still be permitted notwithstanding that there might be a small difference in the identity of the members of the scheme company and of the new parent undertaking before and after the scheme.

26. In this case, under the Scheme there will be an exact replication in STERIS Ireland of the Company's register in respect of the Ordinary Shares. However, not all members of the Company will become members of STERIS Ireland, because the Preference Shares are not the subject of the Scheme, and hence the holder of the Preference Shares will not become a member of STERIS Ireland.

27. I am, however, satisfied that the requirements of section 641(2B)(b) will be met, because the holder of the Preference Shares represents a very small proportion of the members of the Company. As at the date of the Court meeting, there were about 96 members of the Company, so that the holder of the Preference Shares represented only about 1% of the total number of members. Indeed, I was told that by the date of the hearing, the number of members had increased to about 170, with the result that it is likely that by the Reduction Record Time, the holder of the Preference Shares would represent an even smaller proportion of the members of the Company. By nominal amount, the Preference Shares represent a very small proportion indeed of the issued share capital of the Company, being only about 0.1%. In short, the approximately 99% (by headcount) or 99.9% (by value) of the members of the Company who will become members of STERIS Ireland clearly comprise "substantially all" of the members of the Company.

28. To be permitted, by reason of sub-section 641(2B)(c), the scheme must also be one "under which … the members of the company are to hold proportions of the equity share capital of the parent undertaking in the same or substantially the same proportions as they hold the equity share capital of the company." That provision appears to require a comparison to be made between the identities and proportionate equity shareholdings of the members of the scheme company and the new parent undertaking before and after the scheme takes effect. The focus is on the effect of the scheme upon equity share capital, and in my judgment, provided that there is an identity or substantial

identity of such persons and their proportionate holdings of equity share capital in the scheme company and the new parent undertaking before and after the scheme, it should not matter that the scheme does not replicate in the new parent undertaking the holdings of shares that do not form part of the equity share capital.

29. It therefore seems to me that each of the requirements of section 641(2B) are met: (a) under the scheme the Company is to have a new parent company, namely STERIS Ireland; (b) under the scheme substantially all of the members of the Company (i.e. everyone other than the single holder of the Preference Shares) will become members of STERIS Ireland; and (c) as a result of the Scheme, the members of the Company who will hold the equity share capital of STERIS Ireland will do so in the same proportions as they currently hold the equity share capital of the Company.

30. I should add that if, contrary to the view that I have expressed above, it were necessary to have regard to all of the members of the Company and to compare their holdings of equity shares before and after the Scheme, the same conclusion could be reached on the basis that the holder of the Preference Shares holds an identical proportion of the equity shares before and after the Scheme takes effect – namely zero.

31. I should further add, in support of my conclusion as to the availability of the disapplication of the prohibition in section 641(2B), that it is quite clear that the Scheme does not infringe any mischief sought to be addressed by the Act. To my mind, it is squarely within the purpose of the restructuring exception outlined in paragraph 7.4 of the BIS memorandum.

32. As regards the other requirements of the statute, the meeting of members was duly convened and held in accordance with the Court's directions, an explanatory statement drawn up in accordance with the requirements of Part 26 of the Act was sent to Scheme Shareholders, and those shareholders approved the Scheme by the requisite statutory majority at the Court meeting.

Minority protection

33. On the evidence before me, it appears that the class of Scheme Shareholders who were the subject of the Court meeting was fairly represented by those who attended the meeting, and there is no evidence to suggest that the statutory majority was acting other than *bona fide*, or to suggest that they were coercing the minority in order to promote interests adverse to those of the class.

Rationality

34. The Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. In particular, the commercial purpose of the Scheme to mitigate the potential risks associated with Brexit was explained by the directors to the Scheme Shareholders in the scheme document; and it was overwhelmingly supported by the Scheme Shareholders at the Court meeting. In such a case the Court will not readily differ from the commercial assessment of the members as to their own interests.

Blot on the Scheme

35. The draft Scheme as circulated to Scheme Shareholders contained one "blot", which is that it defined the "Reduction Record Time" as 23.59 hours GMT on the business day immediately preceding the date upon which the Court Order sanctioning the Scheme is made. That time could have been as early as 23.59 hours last Friday, 22 March 2019, which would not have corresponded with the more prominent statement in the explanatory statement that trading in the Scheme Shares on the NYSE was anticipated to continue up to and including this Wednesday, 27 March 2019.

36. The Company wishes to ensure that the Scheme, as sanctioned, matches the likely expectations of Scheme Shareholders as regards trading on the NYSE, which has indeed continued this week. It therefore seeks to amend the definition of the Reduction Record Time to 23.59 GMT on Wednesday 27 March 2019, which corresponds with the timetable that I outlined earlier in this judgment.

37. Since the Scheme is a simple one under which the Scheme Shares will be exchanged for an equivalent number of shares in STERIS Ireland, and no other monetary or other consideration will be payable, I see no obvious prejudice that might be caused to shareholders by permitting the Company to amend the terms of the draft Scheme in this respect. Persons who have acquired their shares or interests in shares in the Company since last Friday will be subject to the Scheme and be issued with shares or interests in shares in STERIS Ireland: persons who have sold their shares in the Company since last Friday cannot properly have intended to acquire shares in STERIS Ireland for their own account. I can also see no reason why any of the members who voted at the Court meeting might have voted or acted differently if the draft Scheme had contained the correct definition: see Re Minster Assets plc [1985] BCLC 200.

Conclusion

38. Accordingly, the Scheme is one which I consider that I can and should sanction in the exercise of my discretion. I shall also confirm the reduction of capital which is plainly being done for the same commercial purpose as the Scheme and does not imperil the position of the Company's creditors.